Supreme Court, U. S.
FILED
SEP 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 79-378

MAGAZINE PUBLISHERS ASSOCIATION, INC.
and
TIME INCORPORATED,
Petitioners,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 6, 1979

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The petitioners, Magazine Publishers Association, Inc. (MPA) and Time Incorporated (Time Inc.), respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the District of Columbia Circuit entered on June 8, 1979 in the consolidated proceedings, *National Association of Greeting Card Publishers, et al. v. United States Postal Service*, No. 78-1448, *et al.*

OPINIONS BELOW

The opinions of the court of appeals (Per Curiam, Leventhal, J. and Tamm, J.), not yet reported, are set forth at Appendix A (App. A). The decisions of the Governors of the United States Postal Service dated

May 19, 1978 are set forth at Appendix B (App. B). Nine copies of the two-volume, unreported Opinion and Recommended Decision of the Postal Rate Commission dated May 12, 1978 have been lodged with the Clerk of the Court.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether in requiring the United States Postal Service and the Postal Rate Commission to apply the court of appeals' interpretation of the ratemaking provisions of the Postal Reorganization Act of 1970, the court failed to give due deference to the agencies' contemporaneous, consistent, and reasonable interpretation of those provisions.

(2) Whether the court below correctly interpreted the ratemaking provisions of the Act:

(a) as requiring the attribution of postal costs to the mail classes, to the maximum extent possible, on the basis of cost-of-service principles which the Postal Service and the Postal Rate Commission had determined were unreliable as a test of cost causality; and

(b) as further requiring the assignment of postal costs to the mail classes, to the maximum extent possible, on the basis of those principles, so as to leave only a small residuum of postal costs to be assigned on the basis of the noncost factors specified in 39 U.S.C. §3622(b).

STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Postal Reorganization Act of 1970, 84 Stat. 719, *et seq.*, as amended, 39 U.S.C. §101, *et seq.*, are set forth at Appendix C (App. C). The section directly at issue in this case, 39 U.S.C. §3622, is also printed below:

§3622. Rates and fees

(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including, but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enter-

prises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

STATEMENT OF THE CASE

This case involves (1) the correct interpretation of 39 U.S.C. §3622, the key ratemaking provision of the Postal Reorganization Act of 1970 and (2) the proper role of the courts in reviewing the decisions of the administrative agencies authorized to establish postal rates under that Act.

Prior to reorganization the postal system of the United States was operated by the Post Office Department (the Department). The Department for many years maintained a "Cost Ascertainment System," which was a "full cost" accounting system whereby all costs of the postal system were "allocated" to the various classes and subclasses of mail. The Congress itself, however, directly established postal rates.

A near national catastrophe, precipitated by the shutdown of the Chicago post office in October 1966, generated a movement for reform of the postal system. On April 8, 1967, President Johnson established the Commission on Postal Organization (the "Kappel Commission"). After extensive study the Kappel Commission in June 1968 published its report, *Towards Postal Excellence.* The report, highly critical of the existing postal organization and particularly the use of the Cost Ascertainment System in postal ratemaking, recommended drastic changes in postal organization and postal ratemaking.

Postal reform bills were introduced in Congress early in 1969 and again in 1970, followed by extensive hearings and floor debates. Differences between postal reform measures passed by the House and Senate were compromised in Conference and the Postal Reorganization Act was enacted on August 12, 1970. [1]

The Act created two new agencies, the United States Postal Service (Postal Service) and the Postal Rate Commission (PRC), and designated each an independent establishment of the executive branch of the Government. 39 U.S.C. §§201, 3601. Congress delegated its legislative authority to establish postal rates and fees to these new agencies and specified the procedures and substantive standards to govern the exercise of that authority. 39 U.S.C. §§3621, 3622, 3624,3625.

The Postal Service initiated the first rate proceeding under the new postal statute on February 1, 1971 by requesting the PRC to submit a recommended decision on a Postal Service proposal for increases in postal

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[1] The legislative history of the ratemaking provisions of the Act is discussed at pages 18-26 of this petition.

rates. PRC Docket R71-1. After extensive evidentiary hearings, briefing, and argument, the PRC issued its Opinion and Recommended Decision, which was approved by the Governors of the Postal Service on June 28, 1972, and ordered placed into effect pursuant to 39 U.S.C. §3625(b).

In its Docket R71-1 Decision, the PRC made some adjustments to the postal rates initially proposed by the Postal Service; both agencies, however, evidenced the same general understanding of the Congressional directive set forth in §3622(b). The Postal Service and the PRC determined that approximately half of postal system costs varied with the volume of mail and were "attributable costs" within the meaning of the first part of §3622(b)(3). All other costs were treated as a pool of "institutional" costs and were assigned, among the non-preferred classes of mail, on a judgmental basis in accordance with the noncost factors specified at §3622(b). Consistent with §3626(a)(1) none of these institutional costs was assigned to the preferred classes of mail.

On June 26, 1973, in appellate proceedings instituted pursuant to 39 U.S.C. §3628, the Court of Appeals for the District of Columbia Circuit affirmed the Governors' order. *Association of American Publishers Inc., et al. v. Governors of the United States Postal Service*, 485 F.2d 768 (1973). In a concurring opinion by Judge Bazelon, however, the court said that "[s]ection 3622(b)(3) is susceptible of a variety of interpretations" and suggested that, in future rate proceedings, the PRC should take a "hard look" not only at the manner in which the Postal Service assigned unattributable costs but also at the amount of costs designated as "unattributable." *Id.* at 779.

The next two postal rate proceedings, Dockets R74-1

and R76-1, culminated in opinions and recommended decisions by the PRC dated August 28, 1975 (R74-1) and June 30, 1976 (R76-1). These decisions contained refinements,[2] but made no basic change, in costing methodology and pricing principles. The PRC specifically rejected the use of accounting formulae for the "attribution" of fixed costs to the various classes of mail.[3] Referring to §3622(b) the Commission in R74-1 stated:

> The statute that Congress enacted requires us to distinguish between attributing costs on a causal basis and assigning the remaining mass of common costs which benefit all or a limited number of services. The key to this distinction lies in an analysis of cost behavior which will lead to a separation of the costs *caused* by the classes and services from all other costs. . . . Before we can distribute costs on that basis, however, we need to know which specific costs change in relation to changes in output or volume. It is by the consistent application of this principle that we can safely say that costs are "caused" by the classes and services. (PRC Opinion, Docket R74-1, Vol. 1, pp. 570-71.)

The Governors approved and adopted both PRC recommended decisions.

Petitions for review and appeals from the Governors' orders were again filed in the United States Court of Appeals for the District of Columbia Circuit. That court heard oral argument on the R74-1 appeals and issued its judgment thereon in a Per Curiam opinion dated

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[2] Refinements in methodology and different cost data led to increased attributions of postal costs—52.5% in R74-1 and 60% in R76-1.

[3] "Specific fixed costs" caused solely by service to a class of mail were attributed to that class.

December 28, 1976. *National Association of Greeting Card Publishers, et al. v. United States Postal Service*, 569 F.2d 570 (1976) (*NAGCP I*, reproduced at Appendix D). The appeals arising from the third postal rate case (R76-1) were eventually dismissed as moot.

In its Per Curiam opinion in *NAGCP I*, the court chose not to dismiss *that* case even though the R74-1 rates had been overtaken by new permanent rates.[4] Instead, the court of appeals proceeded to interpret §3622(b) as a "clear" and "express" statutory command of the Congress that cost-of-service principles (sometimes referred to by the court as "cost accounting principles")[5] must be applied to the fullest extent possible in both attributing and assigning postal costs for purposes of postal ratemaking. The court declared that the Postal Service and PRC had "flouted" that command. App. D40-41.

Although the court disclaimed an intent to prescribe a particular costing methodology or an acceptable percentage of attribution, it did, in fact, dictate a three-step methodology for postal ratemaking as follows:

> Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the

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[4]The court found that "the instant controversy falls squarely within the 'capable of repetition, yet evading review' exception to mootness. . . ." App. D14-15, fn. 21.

[5]See App. D26,31.

Postal Service that may reasonably[74] be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

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[74] We emphasize that "reasonably" as used in subsection 3622(b)(3) in connection with assignable costs must be read against the overall purpose of the section, which is to maximize the use of cost-of-service principles throughout postal ratemaking. Simply put it means that all reasonable efforts must be made to assign unattributed costs to the various classes of mail and service by use of acceptable cost-of-service estimates rather than to allocate them discretionarily as residual costs. (App. D40.)

In support of its construction of §3622(b) as compelling maximum use of "cost-of-service principles," the court relied heavily upon the word "requirement" which appears in subsection 3622(b)(3) and excerpts from the legislative history which, according to the court, indicated an aim of the Congress to "get politics out of the Post Office." App. D30-31, 36-37.

A different view of §3622(b) was taken by Judge MacKinnon, a member of the *NAGCP I* panel. In a concurring opinion, he said:

> A mere reading of this section indicates that Congress intended to vest a substantial discretion in the Commission to recommend rates and fees that are "fair and equitable," that relate to the value of the postal service provided to users, that consider competition, the effect upon the general public and business interests, the ease of handling certain mailable matter, the simplicity of the entire rate structure and such other factors as the Commission might deem appropriate. But if the Per Curiam opinion regarding section (b)(3) is to be construed as requiring that the attribution and assignment of practically all costs be on a strained

> cost-of-service basis, these discretionary factors may never have any substantial effect. How could the Commission recommend a rate for a particular class of mail that it found would be "fair and equitable" and would not adversely affect legitimate business interests if practically all the relevant costs were required to be attributed or assigned according to an almost absolute cost-of-service straight jacket? To make the seven discretionary standards meaningful Congress must have intended that there be some substantial volume of costs that are available for assignment. (App. D74.)

The Postal Service filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, contending, *inter alia*, that the interpretation of §3622(b) made by the majority of the *NAGCP I* panel was erroneous and "a radical revision of the statute rather than a reading of it."[6] The court denied the Petition for Rehearing; no party sought *certiorari*.[7]

The instant case commenced with the filing by the Postal Service on July 13, 1977 of its fourth proposal since reorganization to increase postal rates. PRC Docket R77-1. That proposal and the PRC's decision reflect the impact upon the agencies of the interpretation of §3622(b) imposed by the Per Curiam opinion in *NAGCP I*. Departing materially from their previous principles, the agencies not only used extended "inferences of causation" to maximize attributable costs but also adopted a new three-step methodology, in response to the directive of the court quoted above at pages 8-9.

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[6] Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc*, D.C. Cir. Nos. 75-1856 and 1857, at page 6.

[7] The decision in *NAGCP I* did not disturb then existing postal rates. This fact may explain why the Postal Service did not seek review of that decision by this Court. MPA and Time Inc. were not parties to the proceedings at *NAGCP I*, hence they had no standing to seek further review.

This new methodology treats *fixed* system delivery costs (termed "service related" costs) as "reasonably assignable" to first, second, and fourth class mail. The result is that postal costs attributed and assigned on the basis of "cost-of-service principles" have now risen to 74.54 percent of total postal costs (PRC, Vol. 1, p. 93), dramatically reducing the costs that may be judgmentally allocated on the basis of the noncost factors in §3622(b).

The Governors approved the PRC's decision on May 19, 1978. App. B. Review was sought by several parties including MPA and Time Inc. The court below heard all of these appeals in a consolidated proceeding entitled, *National Association of Greeting Card Publishers, et al. v. United States Postal Service,* No. 78-1448, *et al.* (*NAGCP III*). MPA and Time Inc. vigorously contended that the panel which decided *NAGCP I* had seriously misinterpreted 39 U.S.C. §3622(b). They also submitted a Suggestion for Hearing *En Banc,* which was denied.

On June 8, 1979, the court of appeals entered its judgment in this case, *NAGCP III.* The court summarily rejected the contention of MPA and Time Inc. that *NAGCP I* was wrongly decided, holding:

> If we were convinced NAGCP I was fatally flawed, our recourse would lie in a request for en banc consideration. We do not initiate that course. (App. A23, fn. 23.)

The court continued its overriding emphasis upon cost-of-service principles. See App. A14, 18-21, 30-32, 95. It affirmed the decisions of the PRC and Governors as "an acceptable first effort at meeting the strictures of *NAGCP I.*" App. A36. "[G]eneral satisfaction" with the cost allocation decisions made by the PRC responsive to *NAGCP I* was coupled with a

demand for "[f]urther improvements." App. A59.

REASONS FOR GRANTING A WRIT

Petitioners are requesting this Court to consider, for the first time, important questions concerning the meaning of the ratemaking provisions of the Postal Reorganization Act of 1970.[8]

I

The Decision Of The Court Below Has A Profound Effect On Postal Ratemaking And Poses New Questions Of Federal Law That This Court Should Settle.

The importance to the Nation of the postal system and of postal rates is reflected in the expression of postal policy appearing in the first paragraph of the first section of the Act of 1970, which states:

> **§101. Postal Policy**
>
> (a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The cost of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

[8] The only decision by this Court in a case arising under the Act is a memorandum decision remanding a case to the court of appeals "in light of . . . amended provisions of the Board of Governors' internal operating procedures." *United States Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977).

To effectuate its policy concerning the apportionment of postal costs, Congress specifically mandated in §3622(b) the application of nine factors in postal ratemaking, seven of which are noncost factors. The opinions of the court of appeals, however, compel the postal agencies to apply cost accounting principles to the fullest extent possible in both the attribution and assignment of postal costs in derogation of the Act's noncost factors and the policy of not apportioning postal costs so as "to impair the overall value of such service to the people."

The cost and pricing principles used in setting postal rates determine not only the rates and fees paid by mail users (now yielding well over $15 billion in revenues) but also the level of appropriations for revenue foregone from free and preferred rate mail categories under §§3217, 3403-05 and 3626(a)(1) of the Act.[9] Rigid adherence to accounting cost-of-service principles that are unrelated to true cost causality precludes effective consideration of market demand factors in postal pricing. This will affect mail volume, mail revenues, and the employment of 660,000 postal workers. The pricing of mail services above mail user demand may cause significant declines in volume in those classes of mail (e.g., second and fourth) which are not subject to the postal monopoly.[10]

This Court should exercise its supervisory power to determine *now* whether the Court of Appeals for the

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[9]The total annual revenues for the Postal Service were determined by the PRC to be $17,586,375,000. The PRC found that those revenues would be recovered as follows: $15,565,329,000 from postage, rates and fees, $1,844,581,000 from appropriations and $176,465,000 from "other income." See PRC, Docket R77-1, Vol. 2, App. A and App. L.

[10]See 18 U.S.C. §§1693-1699, 1724 and 39 U.S.C. §§601-606.

District of Columbia Circuit has erroneously imposed its own interpretation of §3622(b) upon the federal agencies responsible for postal ratemaking. Although §3628 of the Act permits appeals to be taken to any court of appeals, judicial review of agency decisions in all of the first four postal rate proceedings conducted under the Postal Reorganization Act has been in the D.C. Circuit.

In view of this history and the fact that both the Postal Service and the PRC are located in Washington, D.C., there is a strong likelihood that venue on appeal in future postal rate cases will be in the same circuit.[11] Even if a petition for review is first filed with the court of appeals in another circuit, it is a virtual certainty that that court would either transfer the appeal to the D.C. Circuit or follow its teachings, reasoning that the remedy for any misinterpretation of §3622(b) lies with this Court. Hence, the chance of a future conflict of decisions between two courts of appeals is remote. Unless this Court grants *certiorari,* the ratemaking principles laid down by the court below will, in effect, have the same finality as a decision of this Court would have and will govern the future course of postal ratemaking.

II

The Court Below Has Read Into The Postal Reorganization Act A Ratemaking Methodology That Is Contrary To The Words Of The Act, To The Intent Of Congress And To The Expert Judgment Of The Agencies Vested With Ratemaking Responsibility.

On its face the decision of the court in *NAGCP III* is an affirmance of a decision of the PRC and the Governors in the fourth postal rate case, PRC Docket R77-1. In reality, however, the court itself is the principal architect of the decisions issued by the postal

[11] Section 3628 provides that 28 U.S.C. §2112 shall apply to such appeals.

agencies in this case, "responsive" to the "strictures of NAGCP I." See App. A11, 36, 59.

Under those strictures, the postal agencies have departed radically from the two-step methodology they applied in the first three postal rate cases. The prime example of change is the new "service related" cost concept, born of the postal agencies' court-mandated search for tenuous "inferences of causation." See PRC, Docket R77-1, Vol. 1, pp. 87-89, 121-24.

The decisions of the PRC and the Governors in the fourth postal rate case plainly state their disagreement with the court's interpretation of §3622(b). The PRC said:

> We would mislead the reader if we left the impression that we regard *NAGCP I* as unquestionably sound and our previous methods as incompatible with the Act. On the contrary, and with all due respect to the court, we believe that the *NAGCP I* ruling was not inevitably required by the statute and has caused us difficulties in its application. Whether or not it remains the law, however,[1] it is the law today and we are bound to follow it to the best of our ability. (PRC, Docket R77-1, Vol. 1, pp. 9, footnote omitted.)

The Governors of the Postal Service agreed. App. B6.

The PRC said that, responsive to the *NAGCP I* decision, it had "both extended attributions beyond the levels previously attained and added . . . reasonable assignments of the type called for by *NAGCP I.*" PRC, Docket R77-1, Vol. 1, pp. 9-10. This resulted in an increase in cost "attributions" from 60 to 65 percent of total postal costs and in the "reasonable assignment" of $1.763 billion of "service related" and contingency costs[12] that would otherwise have been judgmentally

[12] "Service related" costs of $1.256 billion plus a contingency allowance of $507 million. See PRC Opinion, Docket R77-1, Vol. 1, p. 156.

allocated on the basis of the noncost criteria of the Act under the ratemaking principles set forth by the PRC in its opinions in Dockets R74-1 and R76-1. In "extended attributions" the court usurped the agencies' ratemaking function by imposing a costing methodology different from the one chosen by the agencies. In "assignments" the same judicial interference inheres and, in addition, the court's interpretation is contrary to the plain language of the Act.

A. Deference Due to Agency Interpretation.

In its opinion in *NAGCP III*, the court below repeatedly characterized its decision as one of restraint and deference to the PRC's expert judgment. App. A21-22, 28, 41-46, 57, 59. But the deference went only to the details of the methodology developed by the agencies within the rigid constraints of *NAGCP I*.

Rather than an example of judicial "restraint," the decisions of the court are the type of judicial intervention in agency discretion which this Court condemned in *FPC v. Transcontinental Gas Pipe Line Corporation*, 423 U.S. 326, 333-34 (1976) and in *Vermont Yankee Nuclear Power Corporation v. National Resources Defense Council, Inc., et al.*, 435 U.S. 519 (1978). By its continuing supervision of postal ratemaking the court below is inexorably imposing on the Postal Service and the PRC the cost-based ratemaking methodology which "the judges of the Court of Appeals . . . would have reached had they been members of the decisionmaking unit of the agency." *Id.*, 435 U.S. 519, 558.

This Court has repeatedly held that an appellate court may not substitute its own interpretation of a regulatory statute for that of the agency charged with

its administration, if the agency's construction is reasonable. *Udall v. Tallman*, 380 U.S. 1 (1965) and cases cited therein at page 16. See also, *Train v. National Resources Defense Council, Inc., et al.*, 421 U.S. 60, 75, 87 (1975).

The court's substitution of its interpretation of §3622(b) for that of the agencies can be sustained only if it is true, as the court claims, that the Congress has so "expressly" and "plainly" mandated the maximization of cost-of-service principles that the agencies' different statutory interpretation (which gave significant effect to noncost factors) amounted to a "flouting" of the statutory command. See App. D 40-47 and App. A 19-21 But there is no such express and plain mandate. The court itself said that the statute "is susceptible to a variety of interpretations" (App. D29, fn. 54) and referred to "the formidable task of definitively interpreting subsection 3622(b)(3)." App. D29. The fact is the court's interpretation cannot be reconciled with the language of the statute or its legislative history.

B. The Language of the Act.

The court below concluded that the use of the single word "requirement" in §3622(b)(3) evidenced Congress' intent that costs, whether they are to be attributed or assigned, must be allocated, to the maximum extent possible, on cost-of-service principles. But, as Judge MacKinnon said in his concurring opinion in *NAGCP I*:

> The word "shall" at the forepart of section 3622 is just as mandatory as the word "requirement," in the same section, if not more so, since it applies to the entire section—but the Per Curiam opinion overemphasizes the latter and refuses to recognize

the former. (App. D77.)

By its overemphasis on (b)(3) as the only "requirement" among the nine statutory factors in §3622(b), the court of appeals has, in effect, rewritten that section. The court's interpretation reads into the statute the words "cost-of-service principles" and "accounting principles," which the Congress did not use, and robs the noncost factors, which the Congress did specify, of any real significance.

C. The Legislative History of the Act.

1. The Influence of the Kappel Commission Report.

The court's interpretation of §3622(b) is not consistent with the legislative history of the Postal Reorganization Act of 1970, as the court contends. In its review of the legislative history the court below ignored the substantial background of events which prompted the executive branch to propose postal reorganization and the legislative materials reflecting these events which provided the factual and conceptual foundation for the 1970 Act. The report of the Kappel Commission is not mentioned by the court, even though that report greatly influenced the development of postal reform legislation.

The Kappel Commission declared that the then existing postal rate structure was "irrational" and strongly condemned the Cost Ascertainment System upon which it was based. That System used the type of cost accounting formulae and cost-of-service principles which the court below said the 1970 Act requires the Postal Service and the PRC to use today. The Kappel Commission said:

> The Post Office uses a Cost Ascertainment System, authorized by a 43-year-old statute, for determining the revenues, volume and cost of each class

> of mail. For determining costs, it uses the "fully-allocated" method through which every postal expense is charged to some class of mail or special service. *A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary but uninformative.* (The Report of the President's Commission on Postal Organization, p. 30 (1968); emphasis supplied.)

As a substitute, the Kappel Commission recommended the development of a functional cost system based on long run variable costs, *i.e.*, costs that vary with mail volume. It recommended further that postal rates for each mail class cover those costs "which it alone causes . . . whether these costs are capital costs or operating costs" plus an appropriate share of all other costs based on market demand considerations. *Id.* at 131. The Kappel Commission made a distinction between postal costs that are (1) "the actual cost of providing the specific service" and (2) "the share of institutional postal costs which each class is asked to bear." *Id.* at 130. The Commission's Report said that there was no undue discrimination in postal rates so long as each class paid " as a minimum, the long-run variable costs ascribable to it—the full added *costs demonstrably related* to that class." *Id.* at 131; emphasis supplied.

The Kappel Commission's cost and ratemaking recommendations were contained in the original administration postal reform bill. H.R. 11750, 91st Cong., 1st Sess. (1969). The ratemaking section provided that each class bear "at least those *costs demonstrably*

related to the class of service in question."[13] The Postal Service was required to "take into account the financial impact upon affected users of the various classes of the mail" in allocating other postal costs to achieve the breakeven mandate that revenues from mail users plus appropriations equal total postal costs.[14]

In explaining the ratemaking provisions of H.R. 11750 to the Senate Post Office and Civil Service Committee, the Postmaster General said:

> Except for free and reduced-rate mail, no postage rate would be set at a level below demonstrably related costs for the particular class or subclass involved. This provides a floor upon which a rate can be built to recover not only the demonstrably related costs but also an appropriate amount of the remaining costs, not traceable to any one service. The proposed legislation does not establish a rigid formula specifying how such allocation of nontraceable costs shall be made, although undue discrimination and preferences are expressly prohibited and all rates are required to be fair and reasonable. The determination as to how nontraceable costs shall be allocated can be made in the light of current economic conditions, and will depend upon the type, value, and quality of service rendered, and such market factors as the ability of users to pay and elasticity of demand.
>
> The Kappel Commission made an important contribution to the rationality of the ratemaking process when it pointed out the shortcomings of the present cost ascertainment system, under which all costs, direct and indirect, are arbitrarily prorated among the several classes of mail without taking into account the differences in service and the differences in market conditions affecting the

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[13]H.R. 11750, 91st Cong., 1st Sess. (1969), §1201(c); emphasis supplied.

[14]*Id.* §1201(d).

various classes.

> Only a costing system which shows what it actually costs to carry each class of mail can be helpful in determining the minimum price the various classes should pay. A supplemental accounting system needed to determine the costs demonstrably related to each class of mail is now being designed, and this system should provide reliable data from which a more rational rate structure can be developed.[15]

The new functional cost system, developed by the Department in response to the Kappel Commission recommendations, was called the Revenue and Cost Analysis. It presented two types of costs, demonstrably related costs and institutional costs. Each amounted to approximately 50 percent of total postal costs. Demonstrably related costs were defined as:

> Those costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.[16]

Institutional costs were defined as:

> Costs which are not directly responsive to changes in postal volume and which are not the consequence of providing a specific class, subclass, or category of service. Institutional costs are the total costs of the postal service, less demonstrably

---

[15] Postal Modernization Hearings Before the Senate Committee on Postal Office and Civil Service, 91st Cong., 1st Sess. (1969), at page 506.

[16] Postal Rates and Revenue and Cost Analysis, Hearings Before the House Subcommittee on Postal Rates, 91st Cong., 2nd Sess. (1970), at page 75.

related costs.[17]

2. The House Bill (H.R. 17070) Versus the Senate Bill (S. 3842).

The House of Representatives eventually passed H.R. 17070, 91st Cong., 2nd Sess. (1970). That bill contained verbatim the ratemaking language of §1201(c) of H.R. 11750, the original administration bill, which established "demonstrably related costs" as the rate floor for non-preferred mail classes.[18] As had H.R. 11750, the House-passed bill also provided for continuation of certain statutory rates for preferred mail classes[19] and for Congressional veto of the rates developed under the new regulatory type proceedings.[20]

The Senate, on the other hand, considered S. 3842, 91st Cong., 2nd Sess. (1970). That bill established an independent rate commission to set postal rates;[21] there was no provision for Congressional veto. S. 3842 contained no minimum rate floor; it only required the rate commission to consider all costs "properly assignable" to each class of mail and several noncost factors.[22] Those noncost factors were not contained in H.R. 17070, but they were similar to the considerations the Postmaster General said should be used in allocating institutional costs. S. 3842 continued no statutory rate preferences, but provided for a phasing-in period for certain rate categories to adjust to whatever higher rates were recommended by the independent rate commission.[23]

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[17] *Id.*

[18] H.R. 17070, §1201(c).

[19] *Id.*, §1202.

[20] *Id.*, §1254.

[21] S. 3842, §3702.

[22] *Id.*, §3704(g).

[23] *Id.*, §3704(i).

The Senate Committee report stated that the Committee had rejected a fully allocated cost approach using arbitrary cost accounting formulae and had refused to endorse any "particular cost accounting system."[24]

Going into conference, then, the major differences over postal ratemaking were:

(1) Congressional veto (continued congressional involvement in ratemaking–H.R. 17070) versus independent rate commission (getting "politics out of the Post Office," *i.e.*,eliminating any congressional role in ratemaking–S. 3842);

(2) Minimum rate floor for each nonpreferred class (demonstrably related costs–H.R. 17070) versus no rate floor for any class, whether preferred or not (rates to be set by an independent commission based on its consideration of cost and newly added noncost factors–S. 3842); and

(3) Continuation by statute of preferred rate categories (H.R. 17070) versus no statutory rate preferences, but a phasing-in period for a transition to higher postal rates (S. 3842).

The *NAGCP I* court believed that the Senate bill was the genesis for the Act's "requirement" language on cost allocations and that the Senate prevailed over the House in the compromises that were made on this critical issue. App. D38-39. The contrary is true. The "demonstrably related costs" recovery section of the House bill was the genesis for the "requirement" language.

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[24] S.Rep. 91-912, 91st Cong., 2nd Sess., at page 17.

3. The Meaning of the Conference Committee Compromises.

The Senate prevailed in "getting politics out of the Post Office," but that meant establishing an independent rate commission (39 U.S.C. §3601) and eliminating any Congressional ratemaking involvement via a veto power. It did *not* mean that subjective judgments based on noncost factors were to be proscribed or relegated to little importance in postal ratemaking. The Senate was the branch of Congress that specified the noncost factors.

A compromise was reached on the preferred rate categories by adopting the phasing-in period contained in S. 3842 (39 U.S.C. §3626) and by establishing an "attributable cost" rate ceiling on preferred rates (39 U.S.C. §3626(a)(1)) identical to the minimum rate floor for nonpreferred classes (39 U.S.C. §3622(b)(3)). Continuation of statutorily prescribed rates was eliminated.

The House prevailed in its minimum rate floor, although this floor was described as the "direct and indirect cost attributable to" a class of mail, rather than as "demonstrably related costs." 39 U.S.C. §3622(b)(3). The House also persuaded the Senate conferees that the statutory rate ceiling for the preferred classes should be based on these same attributable costs. The noncost criteria in S. 3842 were included as factors the Commission "shall" consider. 39 U.S.C. §3622(b).

Since it was the House version that contained the minimum rate floor and the statutory rate preferences for preferred classes which prevailed in the conference, the most reliable indication of Congressional intent is the Statement of the Managers on the part of the House. The House Managers said:

> The conference substitute adopts the Senate provision with an amendment which incorporates the standard that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.
>
> The provision in the conference substitute with respect to costs attributable to a class of mail or type of service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.[25]

With respect to statutory rate preferences the House Managers said:

> The conference substitute adopts the Senate provisions [for a phasing-in period] with an amendment which provides that revenues from rates on nonprofit preferred rate mailings shall not, after 10 years, exceed postal costs for such mail excluding any portion of overhead or institutional costs.[26]

In the House debate on the Conference Report, Congressmen Derwinski and Udall, both key House conferees, equated "attributable costs" with "demonstrably related costs."[27]

Thus the legislative history contradicts the *NAGCP I* court's conclusion that Congress intended that postal

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[25] Statement of Managers on the part of the House, H.R. Rep. No. 91-1363, 91st Cong., 2nd Sess. (1970), at page 87.

[26] *Id.* at page 86.

[27] See 116 Cong. Rec. 27602, 27606 (1970).

costs be both attributed and assigned to the maximum extent possible using cost-of-service principles. Congress intended that rates for nonpreferred classes cover at least attributable costs; all other costs were to be assigned on the basis of the noncost criteria. Rates for the preferred classes were limited to attributable costs.

This reading of the Act is buttressed by subsequent legislative activity. Prompted by its concern that the PRC had given insufficient consideration to noncost criteria in setting postal rates, Congress, prior to the *NAGCP I* decision, added a new noncost criterion, "the educational, cultural, scientific, and informational value to the recipient of mail matter."[28] Also, in the House, an amendment was offered by Representative Schroeder to require allocation of costs utilizing the type of cost-of-service principles the *NAGCP I* court subsequently read into the Act. It was defeated.[29]

Nowhere, then, does the legislative history support the version of Congressional intent expounded by the *NAGCP I* court and reaffirmed in *NAGCP III.*

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[28]Public Law 94-421, 94th Cong., 2d Sess., September 24, 1976, §10, 90 Stat. 1303, 1311. Also see Rep. Ford's statement in the floor debates on the Conference Report. 122 Cong. Rec. 29747-48 (1976).

[29]See 121 Cong. Rec. 30777-84 (1975).

CONCLUSION

For the reasons stated above, a writ of *certiorari* should issue to review the judgment and opinions of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September 6, 1979

Supreme Court, U. S.
FILED
SEP 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-378

MAGAZINE PUBLISHERS ASSOCIATION, INC.
AND
TIME INCORPORATED,

v.

THE UNITED STATES POSTAL SERVICE,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Opinions of the United States Court of Appeals for the District of Columbia Circuit

No. 78-1448, *et al.*

National Association of Greeting Card Publishers, et al. v. *United States Postal Service*

(NAGCP III)

June 8, 1979

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1448

* NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
COUNCIL OF PUBLIC UTILITY MAILERS,
GROWERS & SHIPPERS LEAGUE OF FLORIDA, ET AL.,
ASSOCIATED THIRD CLASS MAIL USERS,
AMERICAN BANKERS ASSOCIATION,
AMERICAN BUSINESS PRESS, INC.,
MAGAZINE PUBLISHERS ASSOCIATION, INC.,
DIRECT MAIL/MARKETING ASSOCIATION, INC.,
READER'S DIGEST ASSOCIATION, INC.,
AMERICAN COUNCIL ON EDUCATION,
UNITED PARCEL SERVICE OF AMERICA,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
and the NATIONAL NEWSPAPER ASSOCIATION,
DOW JONES & COMPANY, INC.,
NATIONAL FOUNDATION—MARCH OF DIMES,
UNITED PARCEL SERVICE OF AMERICA, INC., INTERVENORS

---

* For convenience the court will refer to this case hereafter as National Association of Greeting Card Publishers v. USPS [Fourth Postal Ratemaking].

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petition for Review of an Order of
the United States Postal Service

No. 78-1449

NATIONAL ASSOCIATION OF
GREETING CARD PUBLISHERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1453

NATIONAL ASSOCIATION OF
GREETING CARD PUBLISHERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1483

TIME INCORPORATED, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1484

TIME INCORPORATED, APPELLANT

v.

UNITED STATES POSTAL SERVICE

Appeal of an Order of the
United States Postal Service

No. 78-1494

GROWERS AND SHIPPERS LEAGUE OF FLORIDA,
and FLORIDA GIFT FRUIT SHIPPERS ASSOCIATION,
APPELLANTS

v.

UNITED STATES POSTAL SERVICE, APPELLEE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1509

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION and
NATIONAL NEWSPAPER ASSOCIATION, PETITIONERS

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1517

AMERICAN BUSINESS PRESS, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1518

AMERICAN BUSINESS PRESS, INC., APPELLANT

v.

UNITED STATES POSTAL SERVICE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1531

MAGAZINE PUBLISHERS ASSOCIATION, INC., APPELLANT

v.

UNITED STATES POSTAL SERVICE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1532

MAGAZINE PUBLISHERS ASSOCIATION, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1683

STATE OF MAINE, STATE OF INDIANA, STATE OF FLORIDA,
STATE OF RHODE ISLAND, STATE OF WASHINGTON,
and STATE OF ARKANSAS, PETITIONERS

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

AMERICAN BUSINESS PRESS, INC.,
STATES OF UTAH, IOWA AND ILLINOIS,
DIRECT MAIL/MARKETING ASSOCIATION, INC.,
MAGAZINE PUBLISHERS ASSOCIATION, INC.,
READERS DIGEST ASSOCIATION, INC.,
TIME, INC. & UNITED PARCEL SERVICE OF AMERICA, INC.,
ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
MAIL ORDER ASSOCIATION OF AMERICA,
PARCEL SHIPPERS ASSOCIATION,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION &
NATIONAL NEWSPAPER ASSOCIATION,
DOW JONES & CO., INC., INTERVENORS

Petition for Review of an Order of
the United States Postal Service

No. 78-1684

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

MAGAZINE PUBLISHERS ASSOCIATION, INC.,
TIME INCORPORATED,
UNITED PARCEL SERVICE OF AMERICA, INC.,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
NATIONAL NEWSPAPERS ASSOCIATION,
STATE OF CONNECTICUT,
DIRECT MAIL/MARKETING ASSOCIATION, INC.,
DOW JONES & CO., INC., INTERVENORS

Petition for Review of an Order of
the United States Postal Service

Argued December 7, 1978

Decided June 8, 1979

Michael B. Meyer, Assistant Attorney General, Commonwealth of Massachusetts, with whom *Francis X. Bellotti*, Attorney General, and *Garrick F. Cole*, Assistant Attorney General, Commonwealth of Massachusetts, and *Donald G. Alexander*, Deputy Attorney General, State of Maine, were on the brief, for petitioner, State of Maine, et al. in Nos. 78-1683 and 78-1684.

Douglas Green with whom *Matthew S. Perlman* and *Charles B. Ruttenberg* were on the brief, for appellant, National Association of Greeting Card Publishers, in Nos. 78-1448, 78-1449 and 78-1453.

Richard Littell with whom *Scott M. DuBoff* was on the brief, for petitioners, American Newspaper Publishers Association, et al. in No. 78-1509 and intervenor in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

John M. Burzio with whom *Louise C. Powell* and *Justin R. Wolf* were on the brief, for petitioners/appellants Time Incorporated and Magazine Publishers Association, Inc. in Nos. 78-1583, 78-1448, 78-1531 and 78-1532 and intervenor in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1683 and 78-1684.

Robert A. Saltzstein, for petitioner/appellant American Business Press, Inc. in Nos. 78-1517 and 78-1518 and intervenor in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1509, 78-1683 and 78-1684.

Maxwell W. Wells, Jr. for appellants Growers and Shippers League of Florida, et al. in No. 78-1494 and intervenor in Nos. 78-1448, 78-1449, 78-1683 and 78-1684.

Frances G. Beck, Assistant General Counsel, United States Postal Service, with whom *John L. DeWeerdt*, Associate General Counsel, *Frank R. Heselton* and *William L. Fang*, Attorneys, United States Postal Service, were on the brief, for respondent.

Also *Ronald R. Glancz*, Attorney, Department of Justice, entered an appearance for respondent.

Timothy J. May, for intervenor Reader's Digest Association, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1509, 78-1683 and 78-1684.

Robert L. Kendall, Jr. with whom *Bernard G. Segal* and *John E. McKeever* were on the brief, for intervenor, United Parcel Service of America, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

Arthur B. Hanson was on the brief, for intervenor, American Newspaper Publishers Association in No. 78-1448.

W. Terry Maquire was on the brief for intervenor, National Newspaper Association in No. 78-1448.

Paula A. Jameson was on the brief, for intervnor, Dow Jones and Co., Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

Richard M. Schmidt, Jr., Ian D. Volner and *Ruth S. Baher* were on the brief, for intervenors, The Association of American Publishers, Inc. and Recording Industry Association of America, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1683 and 78-1684.

Also *Eugene E. Threadgill* entered an appearance for intervenor The Council of Public Utility Mailers in Nos. 78-1448, 78-1449, 78-1683 and 78-1684.

Also *J. Edward Day* entered an appearance for intervenor, Associated Third Class Mail Users in Nos. 78-1448, 78-1449, 78-1453, 78-1683 and 78-1684.

Also *Kenneth Wells Parkinson* and *William J. Olson* entered appearances for intervenor National Foundation —March of Dimes in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484 78-1494, 78-1509, 78-1517, 78-1518, 78-1683 and 78-1684.

Also *William H. Smith* and *Michael F. Crotty* entered appearances for intervenor, American Bankers Association in Nos. 78-1448, 78-1449, 78-1453, 78-1683 and 78-1684.

Also *Dana T. Ackerly* and *David A. Levitt* entered appearances for intervenor, Direct Mail/Marketing Association, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

Also *David C. Todd* entered an appearance for intervenors, Parcel Shippers Association and Mail Order Association of America in Nos. 78-1449, 78-1453, 78-1483, 78-1484, 78-1494 and 78-1509.

Also *Francis R. Cawley* entered an appearance for intervenor, Agricultural Publishers Association, Inc. in Nos. 78-1517 and 78-1518.

Before TAMM and LEVENTHAL, *Circuit Judges*, and WILLIAM B. BRYANT,* *Chief Judge*, United States District Court for the District of Columbia.

Opinion PER CURIAM.

Opinions for the Court filed by Circuit Judges LEVENTHAL and TAMM.

PER CURIAM: In these cases the court reviews and affirms orders of the Board of Governors of the United States Postal Service approving a recommended decision of the Postal Rate Commission on increases in postal rates and fees. There are two opinions for the court. Judge Leventhal's opinion recounts the background of the litigation and considers the various objections of the parties to the cost allocation approaches of the Postal Service. Judge Tamm's opinion deals with claims that the Governors and Commission erred 1) in rejecting a proposed first-class "citizens' rate;" 2) in including in revenue requirement an item to recover past losses incurred by the Service; and 3) in imposing "constraints" on parcel post rates found to be otherwise cost-justified.

LEVENTHAL, *Circuit Judge*: In this case the court again has occasion to consider the response of the United States Postal Service ("USPS" or "Postal Service") to the "special, and quite demanding, ratemaking require-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

ments"[1] of the Postal Reorganization Act of 1970 ("Act")[2] and to this court's views concerning those requirements.

This case arises from the fourth general ratemaking proceeding under the Act. Our principal focus here, as in our cases reviewing earlier ratemaking proceedings,[3] is on the methods by which the Postal Service, in setting the rates for the various classes of mail, allocates its costs among those classes. In particular, we must assess the Postal Service's "service related cost" methodology, by which it undertook—in response to this court's mandate in *National Association of Greeting Card Publishers v. USPS* [*NAGCP I*][4]—to assign to certain classes

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[1] National Ass'n of Greeting Card Publishers v. USPS [*NAGCP I*], 186 U.S.App.D.C. 331, 336, 569 F.2d 570, 575 (1976), *vacated as to other issues*, 434 U.S. 884 (1977).

[2] Pub. L. No. 91-375, 84 Stat. 719.

[3] *NAGCP I*, *supra*; Association of American Publishers, Inc. v. Governors of USPS, 157 U.S.App.D.C. 397, 485 F.2d 768 (1973). *American Publishers* reviewed the first general ratemaking, Docket No. R71-1, the central feature of which was the adoption of the 8 cent first-class rate. *NAGCP I* reviewed Docket No. R74-1, which established the 10 cent first-class rate. In the third general ratemaking proceeding, Docket No. R76-1, the 13 cent first-class rate was adopted. While petitions for review and appeals of Docket No. R76-1 were pending before this court, the decisions in the instant ratemaking proceeding, Docket No. R77-1, were entered; consequently, the Docket No. R76-1 proceedings were dismissed for mootness. *But see NAGCP I*, *supra*, 186 U.S.App.D.C. at 339 n.21, 569 F.2d at 578 n.21 (shortness of postal ratemaking cycle suggests controversy in Docket No. R74-1 "capable of repetition, yet evading review"), citing Roe v. Wade, 410 U.S. 113, 124-25 (1973).

[4] 186 U.S.App.D.C. 331, 569 F.2d 570 (1976), *vacated as to other issues*, 434 U.S. 884 (1977).

of mail fixed delivery costs deemed to result from the maintenance of a six-day-a-week, as opposed to a three-day-a-week, mail delivery schedule.

Secondarily, we also consider certain additional claims: By first-class users contending that the approved rate structure unduly discriminates against first-class mail; and by second-class users challenging certain specific cost attributions and rate decisions.

As to the cost allocation issues that are the subject of this opinion, we affirm. The ratemaking process under the Act has reflected a constructive interaction between the Postal Service and this court that has, to a large extent, developed and sharpened the governing concepts. While certain gaps remain that will be highlighted, the efforts of the Postal Service in this ratemaking proceeding represent a reasonable response to these governing concepts.

I. Administrative Proceedings

The decision that we review was the culmination of a proceeding, known as Docket No. R77-1, carried out in accordance with the Act's complex ratemaking procedures.[5] The Postal Service initiated the process on July 13, 1977, by filing with the Postal Rate Commission (PRC) a request for a recommended decision on changes in postage rates and fees for postal services. As required by applicable regulations,[6] the request contained detailed information on the Postal Service's current financial position, its anticipated revenue needs, and its proposed cost allocation and rate schedule. The request was accompanied by the direct testimony and workpapers of 11 supporting witnesses, and numerous exhibits.

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[5] 39 U.S.C. §§ 3621-28 (1976).

[6] 39 C.F.R. § 3001.54 (1978).

The request, as subsequently amended, stated that without increases in rates and fees, USPS would incur a revenue deficiency in the "test year" [7] of $2,410 million.[8] USPS proposed increases in most rates and fees to eliminate the projected deficiency. Perhaps the most notable rate proposal was one to bifurcate the rate for first-class mail—then 13 cents for the first ounce—into a 16 cent regular first-class rate and a special 13 cent citizens' rate. USPS projected that its proposed rate schedule would substantially fulfill a revenue requirement of $17,642 million.[9]

Because of a statutory deadline mandating transmittal of a recommended decision within 10 months,[10] the proceedings were conducted before the Commission en banc, without initial reference to an administrative law judge. A total of 62 intervenors and limited participants, together with an Officer of the Commission (OOC) ap-

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[7] In this proceeding, USPS adopted, and the PRC approved a "hybrid test year" comprising the period March 25, 1978 to March 24, 1979. Prior regulations had defined the test period in rate proceedings to be a "fiscal year beginning not more than 12 months" subsequent to the filing of the request for a recommended decision. 39 C.F.R. § 3001.54(f)(2) (1978). The restrictiveness of this rule and the inherent lag in the PRC's decision process resulted in the likelihood that a substantial portion of the test year would elapse before the rates proposed for that period could take effect. *See* Postal Rate Commission, Docket No. R77-1, *Postal Rate and Fee Increases, 1977, Opinion and Recommended Decision,* vol. 2, App. B (May 12, 1978). [The PRC decision is in two volumes. Volume 1 consists of the PRC's opinion and recommended decision. Volume 2 contains 10 appendices. Citations to volume 1 will be to "PRC Op." Citations to volume 2 will be to the specific appendix, *e.g.*, "PRC App. B."]

[8] *See* PRC Op. at 18-19.

[9] PRC App. A at 1 (table).

[10] 39 U.S.C. § 3624(c) (1976) (as amended by Pub. L. No. 94-421, § 5(a), 90 Stat. 1306 (1976)).

pointed to represent the interests of the general public, took part. The Commission heard 75 witnesses in 62 days of hearings. The record was closed on February 22, 1978, briefs were submitted, and oral argument was heard for two days on March 28 and 29, 1978.[11]

The PRC issued its opinion and recommended decision on May 12, 1978. The decision modified slightly USPS's projected revenue requirement from $17,642 million to $17,585 million.[12] The Commission also modified USPS's proposed rates in several respects. Most significant was its rejection of the bifurcated first-class rate in favor of a single 15 cent rate.

In two separate decisions, one addressed to the citizens' rate and one to the other determinations of the PRC, the Board of Governors of the Postal Service approved the recommended decision on May 19, 1978. The rate increases took effect on May 29, 1978. Numerous parties then filed the petitions for review that are now before us.

II. Judicial Constraints

A. *Controlling Principles*

Full understanding of the specific issues raised in this case requires some discussion of the broader regulatory context: the manner in which this court has reviewed the Postal Service's efforts to develop and to apply workable principles of ratemaking under the Act. This court has stressed the congressional purpose to reduce the subjectivity inherent in the political ratemaking process that prevailed before enactment of the Act, and has required the Service to fashion methods that ensure that the rates for the various mail classes and postal services reflect as closely as possible the cost of providing these services.

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[11] PRC Op. at 3.

[12] *Id.* at 21-22; PRC App. A at 1 (table).

In considering the Service's rate requests, the Postal Rate Commission faced the formidable task of developing ratemaking principles of nationwide applicability and importance on a virtually clean slate. In 39 U.S.C. § 3622 (b) (1976), Congress enumerated the factors the Commission must take into account in formulating its recommended decision. The crucial criterion has emerged out of § 3622(b)(3), which establishes

> the requirement that each class of mail or type of mail service bear the direct and indirect postal costs *attributable* to that class or type plus that portion of all other costs of the Postal Service reasonably *assignable* to such class or type.[13]

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[13] 39 U.S.C. § 3622(b) (1976) provides in full:

> Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
>
> [Continued]

(Emphasis supplied). The central concern of prior ratemakings, as well as this one, has been to give content to the references to "attributable" and "assignable" costs.

In its first two rate proceedings under the Act, the Commission adopted a two-step approach to the allocation of the costs of operation of the Postal Service among the classes of mail. The Commission first "attributed" to the various mail classes and postal services only those costs demonstrably caused by providing the particular service, thereby establishing a rate floor for each class and service. The key to determining causation was a strict requirement of a showing of cost variability—that a particular cost varied with a change in volume of the service provided. Excluded from this calculus were all cost allocations that might be derived by approximation or estimation but for which causation could not be conclusively demonstrated under the variability analysis. Thus, "[t]he stricture of this approach and the unavailability of complete data led in the first two rate proceedings to recommended decisions which, by the Commission's own account, did not attribute to each class all the costs that likely were the result of providing the particular service." [14]

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[13] [Continued]

> (6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
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> (7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;
>
> (8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and
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> (9) such other factors as the Commission deems appropriate.

[14] *NAGCP I, supra,* 186 U.S.App.D.C. at 342, 569 F.2d at 581 (footnote omitted).

In the second step, the costs remaining—after the attribution in the first step—were "assigned" to the various classes under a "value of service" or demand theory approach. Specifically, the Commission developed an "inverse elasticity rule," under which final rates were derived "by assigning to the various classes of mail different markups (above attributed costs) in inverse proportion to the relative elasticity of demand for each of the classes." [15] In this way, the Commission purported to "assign costs in a manner that fully takes into account the noncost factors of the statute." [16]

In our first consideration of the ratemaking requirements of the Act, we affirmed the decision of the Governors approving the PRC's recommended decision in the first postal ratemaking proceeding, Docket No. R71-1. *Association of American Publishers, Inc. v. Governors of USPS*, 157 U.S.App.D.C. 397, 485 F.2d 768 (1973).

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[15] *Id.* at 343, 569 F.2d at 582. The court in *NAGCP I* described the concept of elasticity of demand and the value of service or demand theory approach as follows:

> [T]he demand for a product is said to be elastic if lowering its price by a specific percentage leads to a greater percentage increase in the volume sold, or if raising its price by a specific percentage leads to a greater percentage reduction in its volume.
>
> Elasticity of demand forms the cornerstone of a demand theory (or "value-of-service") approach to apportioning costs. Such an approach seeks to minimize the impact that an increase in rate will have on services with positive demand elasticities by "impos[ing] on the services in relatively inelastic demand . . . higher surcharges, over and above marginal costs, than would be imposed by *any* rule of apportionment based exclusively on cost relationships."

Id. (footnotes omitted), *quoting* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 378 (1961) (emphasis in original).

[16] *NAGCP I, supra*, 186 U.S.App.D.C. at 343, 569 F.2d at 582 (footnote omitted).

Despite the affirmance, we took pains to express our concern over the ratemaking approach adopted by the PRC. Judge Bazelon's concurring opinion, which was joined by the other two members of the panel, noted that the Commission's attribution in that proceeding accounted for only 49 percent of the Postal Service's total costs. The remaining 51 percent was "reasonably assigned" by two USPS employees using what that opinion called a "vague formula" that consisted essentially of value-of-service considerations. *Id.* at 406-07, 485 F.2d at 777-78. The concern was that the approach permitted unstructured and essentially unreviewable discretion in the USPS staff to allocate more than half the costs of the Service. The result was emphasis on non-cost considerations, the kind that Congress had intended to excise as much as possible from postal ratemaking. The court chose not to disturb the decision, however, in view of the presumption accorded initial efforts under a novel regulatory scheme,[17] and the prospects for improved tracing of costs under PRC and USPS procedures. *Id.* at 407-08, 485 F.2d at 778-79.

The Service and the Commission failed to heed the cues of *American Publishers.* In Docket No. R74-1, the second general postal ratemaking, the Commission again applied the two step approach, "attributing" only 52.5 percent of all costs and "assigning" the remainder under the "inverse elasticity" principle. In doing so, the Commission rejected entirely the initial decision of the Administrative Law Judge. His initial decision had attributed 70.6 percent of the total costs by means of cost accounting principles that permitted allocation of costs to particular classes even where direct cost variability could not be demonstrated. It assigned the remaining costs primarily in

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[17] *See* Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

accordance with cost-of-service, rather than value-of-service, principles.[18]

On judicial review, we held that this two step approach of the PRC did not comply with the requirements of the Act. *National Association of Greeting Card Publishers v. USPS* [*NAGCP I*], 186 U.S.App.D.C. 331, 569 F.2d 570 (1976), *vacated as to other issues*, 434 U.S. 884 (1977). In the language of § 3622(b)(3) and the legislative history of the Act, we discerned an obligation to apply cost-of-service ratemaking principles to the greatest extent possible. *Id.* at 346-50, 569 F.2d at 585-89. Thus, of the ratemaking criteria enumerated in § 3622(b), only § 3622(b)(3) was framed as a "requirement," emphasizing the special role played by cost

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[18] *NAGCP I*, *supra*, 186 U.S.App.D.C. at 344-45, 569 F.2d at 583-84. The ALJ employed "distribution keys" such as weight, volume and number of pieces of mail to apportion among the classes of mail costs that were otherwise not measurably variable. For example, he reasoned that transportation costs (defined in that proceeding to include all the costs—such as salaries and vehicle costs—incurred in carrying mail from the patron's collection point to the receiving point) were governed by considerations of the weight and volume of the mail carried. Volume dictated the number and size of vehicles necessary, as well as the costs of drivers, fuel and maintenance. Weight affected the loading and unloading effort and also bore on the strength and operational expenses of the vehicles. Further, weight and volume affected the efforts of the mail carrier on his route. From these considerations, the ALJ drew an inference of causation sufficient to permit attribution of 98% of the total transportation costs. (Employing its variability approach, USPS in its presentation had attributed only 21% of transportation costs, characterizing the remainder as fixed costs subject to discretionary assignment.) Applying his method, the ALJ attributed over 70% of the total costs. He then assigned most of the remaining 30% of costs that had not been attributed to the classes in proportion to the attributed costs borne by each class, unless one of the non-cost factors of § 3622(b) dictated deviation.

considerations. The requirement that each class or type of service bear the "direct and indirect costs attributable" to it necessitated an "extended attribution" that would take into account indirect costs that were not measurably variable but that could, by employing cost allocation formulae based on accounting principles, "be determined with reasonable confidence to be the consequence of providing the service." *Id.* at 347, 569 F.2d at 586. Further, by referring to "all other *costs* reasonably assignable to such class or type," the section required that even the process of assignment was to be carried out in accordance with cost-of-service principles. Finally, we found that the proper locus for allocation on non-cost principles was to be found in the language of § 3622(b)(3), which contemplated that not all postal costs were to be attributed or assigned to a particular class or service. As to the residuum of costs, the other, "discretionary" criteria of § 3622(b) would come into play.

We found this reading of the statutory language supported by the legislative history of the Act. The central purpose of the Act was to "get politics out of the Post Office"—to eliminate the discretion to set rates that had resulted in discrimination against certain classes of mail. We noted:

> Prior to the Act the Service enjoyed broad discretion in the allocation of postal costs, a discretion which in the past had made the setting of postal rates susceptible to political bartering and the frequently abusive influence of lobbyist efforts. . . . [I]t would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential for continuing the same discriminatory treatment that the Act so clearly intended to remedy.

Id. at 350, 569 F.2d at 589. Under this standard, we found a deficiency in the Postal Service approach, which employed cost-of-service principles only where direct cost variability could be demonstrated, leaving about one half of total costs subject to discretionary allocation. We summarized the statute's requirements as follows:

> [T]he Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost of service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

Id. (footnote omitted).

Our principal function in the previous postal rate cases lay in ascertaining the broad approaches mandated by Congress for the PRC's exercise of its ratemaking authority. Sound principle bids us accompany any further judicial review—of the specifics of these approaches and tracing methodologies—with diffidence and restraint.[19]

While cost allocations often possess a patina of scientific precision, they remain ultimately matters more of

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[19] *Compare* Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971) (reviewing court exercises restraint once it determines that there are no procedural inadequacies, the legislative mandate has not been bypassed, and the agency has engaged in reasoned decision-making).

judgment and appraisal than of mathematical certainty.[20] Recognizing the crucial play of judgment in this area, reviewing courts have traditionally deferred to agency expertise and have abstained from imposing unrealistic technical requirements or standards of precision on the administrative process. As we have pertinently summarized the matter, selection of ratemaking theories is more a question of policy than of fact: "A theory of ratemaking must be reasonable, explained, and supported, but is not subject to the same substantiation principle as the substantial evidence test applicable to fact-finding." [21] Similarly, a method of cost allocation may not be rejected simply because difficulties can be identified. Justice Brandeis long ago remarked that "experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate." [22]

In *NAGCP I*, we recognized our obligation to defer to the PRC's expert judgment in the selection of cost allocation methodologies. 186 U.S.App.D.C. at 353-54, 569 F.2d at 592-93. We noted that "to be acceptable, a methodology need only be reasoned, nonarbitrary and permissible under the statute." *Id.* at 352, 569 F.2d at 591. Our deference is particularly great where the PRC has gone beyond even the "reasonable inferences of causation" that permit "extended attribution" into the zone of "assignment." While both attribution and assignment involve inferences of causation, we observed in *NAGCP I*

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[20] *See* New York v. United States, 331 U.S. 284, 328 (1947); Colorado Interstate Gas Co. v. FTC, 324 U.S. 581, 589-90 (1945).

[21] Continental Airlines, Inc. v. CAB, 179 U.S.App.D.C. 334, 342, 551 F.2d 1293, 1301 (1977).

[22] Groesbeck v. Duluth, S.S. & A. Ry., 250 U.S. 607, 614-15 (1919). *See also* Second National Natural Gas Rate Cases, 186 U.S.App.D.C. 23, 43-45, 567 F.2d 1016, 1036-38 (1977), *cert. denied*, 435 U.S. 907 (1978).

that "the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former." *Id.* at 348 n.59, 569 F.2d at 587 n.59.

B. *Marginal Cost Pricing*

Several parties to Docket No. R77-1 urged the PRC to reject the holding of *NAGCP I*.[23] The PRC properly declined the invitation. But it did lament that *NAGCP I* foreclosed its continued adherence to what it referred to as the "most talked about new development in rate regulation today"—so-called marginal cost pricing.[24] *See* PRC Op. at 75-82.

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[23] Several petitioners persist in their attack on *NAGCP I* by asking this court to review the legislative history that was canvassed extensively in that opinion and to declare that *NAGCP I* was wrongly decided. If we were convinced *NAGCP I* was fatally flawed, our recourse would lie in a request for en banc consideration. We do not initiate that course.

One point does deserve comment. In 1975, prior to the argument and decision in *NAGCP I*, the House of Representatives rejected an amendment offered by Representative Schroeder that would have amended 39 U.S. § 3622(b)(3) to codify the cost allocation approach advocated by the ALJ in Docket No. R74-1; *see* note 18 *supra*. 121 CONG. REC. 30,777-84 (1975). Petitioners assert that the court in *NAGCP I* was "not informed" of this development. Brief for ANPA/NNA at 35. Quoting statements of members on the floor, they contend that this congressional action demonstrates Congress's understanding that the original Act embodied the ratemaking methodology adopted by the PRC in its first two ratemaking proceedings. Rejection of a clarifying amendment is not definitive evidence of an earlier Congress's intent in enacting a statutory provision. That is especially the case when that intent has not yet been conclusively interpreted by the courts; Congress may prefer to await a judicial interpretation. We also reject the claim of Time Inc. and the Magazine Publishers Association that the PRC somehow erred in adhering to the mandate of *NAGCP I*, thereby "substituting the court's judgment for its own judgment and methodology." Brief for Time/MPA at 38-40.

We refer to this passage, although it is not the occasion of specific protest to us, for several reasons. We are concerned that it may reflect a hostility to our opinion that has resulted in an application first grudging and then inconsistent. We are also concerned that our ruling may have been carried too far, beyond what was originally envisioned. We would not wish our rulings to result, by virtue of misapprehension, in a loss of efficiency that was not required by or implicit in the statutory mandates.

As to "marginal cost pricing," traditional economic theory, if we may sketch our general understanding, holds that in a system of "pure" or "perfect" competition the most efficient allocation of resources occurs when the price of a good or service equals its marginal cost—the cost to the economy of producing one additional unit. The marginal cost concept includes variable costs but not historic fixed costs ("sunk" costs), though it does include the cost of capital if capital investment is required to increase capacity for additional production. Traditional economic theory concludes that a price set at marginal cost achieves the optimum equalization of the current cost to society of employing scarce resources and the value to consumers of using those resources. In a system of perfect competition, an individual producer will employ his productive capacity to the degree that he can recover his variable costs, thereby minimizing average cost and maximizing attainable profit at the market price.

We do not presume to venture at large into economic theory, but it seems pertinent to observe even at this point of discussion, that the foregoing traditional theory presumes that a firm operates in an environment where market price is determined independently of the cost structure or management decisions of any individual enterprise, and where the firm tends to halt production when its marginal cost exceeds the market price.

The transfer of marginal cost pricing theory to regulated monopolies presents obvious difficulties, including

the inapplicability of the basic free-market assumptions.[24] However, it is appropriate to note that in the view of some economists, economic efficiency is similarly enhanced when the prices charged by regulated utilities are set at the long run marginal costs of the enterprise, including not only the variable cost of producing an additional unit with existing capacity, but the costs of adding additional capacity to meet increases in volume.[25] Traditional rate-making principles require, however, that total revenues generated by the regulated utility cover the historic costs of the enterprise, including a return on useful investment, as well as current operating and future capacity costs. In return for the guarantee of such a return the utility foregoes opportunities to charge the "market prices" that might be exacted from consumers. There is not a free market but a market under the constraint of what is, in effect, a long-range regulatory bargain. There is no certainty that the total revenues guaranteed by the regulatory understanding will equal the revenues that would be generated by pricing at marginal cost—which is prospective in nature even though long run marginal cost

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[24] Indeed, the application of marginal price theory presents difficulties outside the area of government rate regulation, to the extent that many suppliers in the broadly competitive areas of the economy regard their products as sufficiently differentiated so that they may act like monopolists in the sense of being unwilling to produce additional units even though marginal costs will be lowered. Their interest is in their marginal revenues, rather than their marginal costs, and they may estimate that the lowering of prices to bring out the demand for additional units will be translated into demands for equivalent lowering of prices by existing purchasers.

[25] *E.g.*, 1 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 63-86 (1970).

Our prior discussion of marginal costs in the market of perfect competition assumed not only short-range marginal costs, within the framework of existing capacity, but long-range marginal costs, with expansion of capacity.

embraces capital additions. (Of course the risk implicit in that lack of certainty is taken into account by the regulator in determining permissible rate of return.)

What economists frequently advance as the solution is the selective use of price discrimination—permitting deviation from marginal costs in inverse proportion to the elasticity of demand for the utility service of various classes of users. The concept is that this minimizes inefficient allocation of resources, because those consumers who would, relatively speaking, consume the same amount of resources regardless of price pay the greatest differential from marginal costs, while those whose level of consumption is most susceptible to price considerations are charged the price closest to marginal costs.[26]

This is the kind of thinking that apparently informed the PRC in its first two ratemaking decisions, although it did not elaborate on its view. The PRC first established an initial rate floor in the process of determining "attributed" costs by ascertaining variable (or marginal) costs. Because strictly variable costs generated only about half the revenues necessary to recover the costs of the Postal Service, the PRC then sought to "assign" the remaining unattributed costs in inverse proportion to the elasticities of demand of the various classes.

In terms of economic efficiency, the advantage of marginal cost pricing for regulated utilities is that it serves as a means of "encouraging the maximum economic use of a company's services consistent with the so-called 'full-cost' requirement." [27] A corollary is its

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[26] *See id.* at 144; Huntington, *The Rapid Emergence of Marginal Cost Pricing in the Regulation of Electric Utility Rate Structures*, 55 B.U.L.REV. 689, 742-46 & n.274 (1975), and authorities cited therein.

[27] J. BONBRIGHT, *supra* note 15, at 379.

potential for close control of consumer demand, by assuring that consumption choices reflect the current costs to society of providing the resource. Marginal cost pricing has attained some currency in electric power ratemaking, where efficient utilization of increasingly scarce energy resources is a matter of primary concern.[28]

In the context of postal ratemaking, however, the dominant objective of Congress, as ascertained by the court in *NAGCP I*, was not so much the regulation of demand for postal services, as the prevention of discrimination among the mail classes. In any event, the concern for maximization of use of capacity is less compelling where demand is inelastic. The court in *NAGCP I* noted that the Postal Service had conceded that demand for all classes of mail was essentially inelastic at foreseeable rates.[29] It rejected the effort to assign almost half the costs of USPS on the basis of relative inelasticities of demand as inappropriate, as in effect permitting a discretion barred by the Act, and as unduly burdening first class mail, the most inelastic of the classes. *NAGCP I* certainly did not command a complete jettison of economic principles. It approved cost variability as an appropriate starting point for cost determinations. The path to be followed from that point on differed from that of the PRC in view of the congressional intent. This is not the only context in which a concern for equal or fair treatment yields results different from those obtainable if economic efficiency in the allocation of resources were the exclusive or even the dominant goal. The choice of

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[28] Huntington, *supra* note 26, at 773-74.

[29] 186 U.S.App.D.C. at 343, 569 F.2d at 582. We do not discuss the possibility that some marginal customers may have flexibility to make other arrangements in the event of additional increases in rates charged by the Postal Service, because that factual condition was not developed in the record before the court in either *NAGCP I* or this appeal.

goals and objectives is a policy choice of the legislature, and the court's function is to ascertain the legislature's choice and to apply it, including the assurance of faithful application by agencies which make decisions subject to judicial review.

III. Service Related Costs

It is to the credit of USPS and the PRC that they have departed from their initial approach to postal ratemaking and have sought with reasonable fidelity to apply the legislative intent as delineated by this court. The task that confronted them in this ratemaking proceeding was formidable. Yet at the present juncture the primary dispute over cost allocation revolves about the allocation of only 7.14 percent of the Postal Service's total revenue requirement.[30] That is the percentage the PRC found "reasonably assignable" to certain classes of mail as "service related costs"—calculated as the fixed delivery costs incurred in maintaining a six-day-a-week, as opposed to a three-day-a-week, delivery schedule. The parties raise numerous challenges to the rationality of this assignment pattern. With the deference we accord the PRC's expert judgment in developing cost allocation methods, we find this method of allocation to be reasoned, nonarbitrary, and congruent with the legislature's objective.

Further discussion of the issue requires that we delve in some detail into the mechanics of the cost allocation process. The PRC essentially followed the approach of USPS's initial presentation, although it developed its own figures in many instances. For convenience, we shall refer in our discussion only to the PRC.

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[30] PRC Op. at 156 (table).

A. *The Domestic Mail Classification Schedule*

It is useful to start with a brief sketch of the various mail classifications as they are defined in the Domestic Mail Classification Schedule.[31] The four general classifications of mail are probably familiar to most mail users. *First-class* consists of letters and sealed parcels weighing 12 ounces or less, plus postal cards and post cards.[32] *Priority mail* is a high priority service akin to first-class for sealed parcels weighing more than 12 ounces.

Second-class and *controlled circulation* are available for magazines, newspapers and other periodicals. Second-class is divided into several subclasses and subcategories. Second-class regular rate is the one that encompasses the vast majority of second-class mailings. Second-class is essentially for bulk, not single piece, mailing.

Third-class is a service for single pieces and bulk mail, consisting of matter that is not mailed or required to be mailed as first-class, is not entered as second-class or controlled circulation, or weighs too little to qualify as fourth-class. Single piece service is used by individuals for small parcels and by organizations for minor distribution of parcels, catalogs and other printed matter. Bulk mail service is used by businesses, institutions or government agencies to send brochures, catalogs, samples or other matter in mailings of 200 pieces or more or with a total weight of 50 pounds or more.

Fourth-class includes parcel post (merchandise weighing 16 ounces or more); bound advertising matter; books, films, sound recordings and other matter entitled to a "special rate;" and library rate mail.

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[31] *See generally* Postal Rate Commission, Docket No. MC73-1, *Mail Classification Schedule 1973, Opinion and Recommended Decision* (April 15, 1976), approved by Governors of USPS (June 2, 1976).

[32] "Postal cards" are printed by the government, while "post cards" are printed privately. *See* PRC Op. at 178.

USPS also offers Express Mail (an expedited delivery service to and from some cities) and many other special services, such as certification, registration and C.O.D.

B. *Attribution of Variable Costs*

As its first step, the PRC determined USPS's revenue requirement by projecting its costs for each of 20 "cost segments" [33] based on estimates of the volume of mail that would be generated at the proposed rates.[34] The PRC determined the revenue requirement to be $17,585 million,[35] modifying USPS's calculation slightly.

Within each cost segment, the PRC then determined the percentage of costs that could be said to vary with volume—over either the short or long run. This percentage was then available for attribution to the various classes by application of an appropriate "distribution key." In the PRC's opinion, cost variability with volume remained the key to attribution. It stated that it could not have "reasonable confidence" that costs were in fact the "consequence of providing the service" unless

> there is at least some showing of volume variability over the long run. If costs do not vary with volume over either the short or long run, there is still the possibility of cost assignment under [*NAGCP I*], but we see no basis for attribution, if we are to maintain any distinction between attribution and assignment.[36]

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[33] Examples of "cost segments" include Postmasters (Segment I), City Delivery Carriers, In-office work (Segment VI), City Delivery Carriers, Out-of-office work (Segment VII), Motor Vehicle Service (Segment XII), Building Occupancy (Segment XV) and Administration and Regional Expense (Segment XVIII). PRC App. A at 1.

[34] *See* PRC App. H (mail volume projections).

[35] *See* pages 12-13 *supra*.

[36] PRC Op. at 84.

In view of USPS's improved data on long run variable costs, the Commission found *NAGCP I*'s requirement of "extended attribution" satisfied. The PRC called for further improvements in data to lessen the need for reliance on "mere inferences of causation." [37]

The PRC apparently takes the position that "mere inferences of causation" beyond volume variability are not an appropriate basis for attribution.[38] This is not entirely congruent with that part of the language of the *NAGCP I* opinion that prescribed *attribution* of costs "through variability theory as well as through other reasonable inferences of causation." [39] Since no party has challenged the PRC decision on this point, we do not pass

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[37] *Id.* at 85.

[38] The PRC apparently continues to resist the application of the kind of cost accounting advocated by the ALJ in his initial decision in Docket No. R74-1 and commended by the court in *NAGCP I*. *See* note 18 *supra*. For example, the Commission rejected an assignment of fixed delivery costs proposed by the Officer of the Commission, the only party other than USPS to present a full costing case. OOC witness Robertson contended that *all* fixed delivery costs could be considered capacity costs reasonably assignable to the classes of mail on a "relative use" basis. Applying a distribution key composed of a combination of pieces and cubic feet, Robertson was able to assign to the various classes $3.1 billion, compared to the $1.4 billion found assignable by USPS in its presentation and the $1.256 billion ultimately assigned by the PRC. The PRC rejected Robertson's approach. Under that approach, it stated, "all postal costs could be assigned to the classes of service for which the physical functions are performed, leaving little, if any, in the way of residual costs and no room for the application of the noncost ratemaking factors listed in § 3622(b) and referred to by the court in the *NAGCP I* decision." PRC Op. at 103.

[39] *NAGCP I, supra,* 186 U.S.App.D.C. at 350, 569 F.2d at 589.

on it.[40] We do observe, however, that the PRC was struggling with the *NAGCP I* court's rather murky distinction between "attribution" (for reasons other than volume variability) and "assignment," both of which were to proceed from "inferences of causation."[41] Taking into account the PRC's expansion of the scope of attributable costs based on variability, its relegation of costs derived from inferences of causation to the assignable category alone may well have been an appropriate application of *NAGCP I.* The context is one in which USPS's enhanced ability to attribute costs on the basis of volume variability resulted in the attribution, after PRC modification, of almost 65 percent of total costs.[42]

C. *Assignment of Service Related Costs*

The PRC's assignment of service related costs proceeded from differences in service accorded the various classes of mail. The Postal Service Manual commits the Service to different standards of service for different types of mail, based on USPS's perception of customer needs, and transportation and distribution capabilities.[43] For

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[40] Petitioners American Newspaper Publishers Association and National Newspaper Association do contend that the PRC misconstrued *NAGCP I* by assigning service related costs, *see* pages 31-35 *infra.* The gravamen of their complaint is that the PRC was too rigorous, rather than insufficiently rigorous, in its application of cost-of-service principles. They state: "if *NAGCP I* meant what the Commission believed, it would be contrary to the statute." Brief for ANPA/NNA at 35. Although framed as a challenge to the PRC's construction of pertinent precedent, this argument is little more than a disguised request to this court to reconsider *NAGCP I,* and has been rejected. *See* note 23 *supra.*

[41] *See* pages 21-22 *supra.*

[42] PRC Op. at 156 (table).

[43] R. 4-01357.

first-class mail and for newspapers (a "service category" within the second-class regular rate classification, also known as "red tag" mail [44]), the Manual requires delivery on "the first delivery trip" if the mail is received at a "distribution facility" prior to the cut-off time.[45] For third- and fourth-class parcels, USPS is required to deliver on the next delivery trip all parcels received prior to the cutoff,[46] but the post offices have more flexibility in determining that cutoff. For all other mail, including third-class mail and second-class publications not entitled to red tag service, the regulations provide for "delivery not later than the second day after receipt." [47]

Two witnesses provided the main evidence before the Commission. Postal Service witness Jellison, the Assistant Postmaster General for Mail Processing, testified on the differences in service standards. Jellison first ranked the priorities of treatment given the various classes of mail, in order of decreasing significance: (1) first-class mail, including priority mail and post or postal cards; (2) newspapers or red tag mail; (3) parcels (both third- and fourth-class); (4) ordinary papers (all second-class not entitled to red tag service and controlled circulation); and (5) circulars (fourth-class bound printed matter and all third-class except single piece parcels). Jellison then

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[44] In order to be eligible for newspaper treatment, publications must be published weekly or more frequently and feature news of general public interest. Postal Service Manual § 125.41. Limitation of eligibility for this service is a subject of current controversy. *See* pages 43-45 *infra*.

Probing from the bench at oral argument elicited that the "red tag" appellation derives from the fact that a pink slip of paper, signalling entitlement to special service, is inserted into the hasp of a mail bag. Tr. of Oral Argument at 58-59.

[45] Postal Service Manual § 352.211.

[46] *Id.* § 352.213.

[47] *Id.* § 352.212.

characterized first-class and newspapers as "preferential" because of the requirement of immediate delivery upon receipt at the distribution facility; parcels as "borderline" preferential; and the other classes as "nonpreferential" or "deferrable" because of the ability to defer delivery of that mail for one day after it reached the distribution facility. The witness differentiated the levels of service afforded preferential and nonpreferential mail at each stage of the mail process between receipt and delivery. He asserted that while preferential and nonpreferential mail were often delivered together, deferrability of some classes permitted workload levelling, and avoidance of the need for overtime or part-time employees, at peak periods, with resultant efficiencies. Jellison concluded that because of the deferrability feature, nonpreferential service standards could be met by delivery every other day, as opposed to the current six-day delivery schedule. In his view, were it not for the existence of preferential mail, a three-day delivery system with recipients receiving mail every other work day would be feasible.[48]

Based on Jellison's conclusion as to the feasibility of a three-day delivery schedule, USPS witness Hume, a private consultant, sought to calculate the costs resulting from the need to maintain six-day delivery to meet preferential service standards.[49] Although transportation and processing costs would likely be affected by initiation of a three-day schedule, Hume focused only on the delivery function. He found that in the other two functions, service related costs either were volume variable (and therefore would be accounted for in the attribution step), or could not be determined with sufficient accuracy from available data.[50]

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[48] PRC Op. at 94-97; R. 4-01352-80.

[49] PRC Op. at 97-99; PRC App. J at 239-66; R. 4-01423-52.

[50] PRC Op. at 99-101.

Hume estimated the delivery costs that would be incurred in a three-day delivery system, assuming no variations in total mail volume. By subtracting this figure from the projected delivery costs in the six-day delivery system, he obtained the delivery costs occasioned by maintenance of a six-day schedule. Because variable costs would be attributed under either schedule, he then determined the proportion of delivery costs that would be fixed under each system. The difference in fixed costs he assigned as service related costs to the classes receiving preferential service.

The PRC approved the methodology proposed by the USPS witnesses. It found that nonpreferential mail is deferrable under the Postal Service's standards and that, in fact, such mail is frequently deferred.[51] It agreed with the Postal Service that "it can reasonably be inferred that the preferred classes cause the differential between 3-day and 6-day delivery costs." [52] Adjusting somewhat USPS's calculations, the PRC made an "assignment" of $1,256 million in test year costs, or 7.14 percent of the total revenue requirement.[53]

While asserting that, as a first effort, the use of service-related costs was satisfactory, the Commission urged further refinement in three areas: (1) the analysis used in determining the cost differentials resulting from service priorities at the delivery stage; (2) the development of data and methodology to reflect more accurately the actual hierarchy of delivery standards in the assignment of service related costs; and (3) more complete investigation

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[51] *Id.* at 102.

[52] PRC App. J at 247.

[53] PRC Op. at 156 (table). Of this sum, $881 million was assigned to first-class, and $67 million to second-class regular rate. The PRC also assigned an additional $507 million, the amount represented by the contingency reserve. *Id.* at 91-93, 156 (table).

into the possibility of extending service related costs to functions other than delivery.[54]

D. *Objections to Assignment of Service Related Costs*

In considering the various challenges to the assignment of service related costs, we recall that we judge a particular ratemaking methodology by whether it is reasoned, nonarbitrary and congruent with the statutory mandate. We do not insist on mathematical precision in developing new ratemaking methods; mere articulation of imperfections in a new scheme will not alone defeat it. This is especially true in cost *assignment*, where, as *NAGCP I* recognized, there is a wide scope for the exercise of judgment and discretion by the PRC. With this overview, we conclude that the service related cost method reflects a reasonable inference of causation and, despite the imperfections identified by the parties, represents an acceptable first effort at meeting the strictures of *NAGCP I*. Our conclusion is supported by PRC's avowed intention to require refinement of the service related cost method in future rate procedings.

The newspaper publishers[55] attack the assignment of service related costs as arbitrary and unreasonable on the ground that nonpreferential mail is rarely, if ever, deferred in the delivery function. According to these parties, the current delivery system is designed to ensure that each carrier can deliver each piece of mail he receives at the delivery unit each working day. To further this design, the Postal Service conducts an annual review of its routes and adjusts them to guarantee delivery of all mail that comes into the delivery unit.[56] On heavy volume

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[54] PRC Op. at 123-24.

[55] Petitioners American Newspaper Publishers Association and National Newspaper Association.

[56] USPS Methods Handbook, Series M-39, *Management of Delivery Services* § 210-243.

days, delivery service managers may use overtime or auxiliary help, but deferral is discouraged.[57] Instead, it is argued, most deferral occurs not at the delivery stage, but in mail processing units before reaching the delivery unit.[58] Based on these facts, the publishers submit that "it is arbitrary and unreasonable to apportion costs upon the basis of a theoretical differential between preferential and nonpreferential mail in the delivery function." [59]

The publishers do not dispute that deferral can and does occur relatively frequently at some point in the mail handling process. The deferrability gives rise to differences between preferential and nonpreferential mail in the overall level of service provided. Accordingly, it was not unreasonable for the PRC to infer that the preferential classes may be called upon to bear the cost of providing the capacity—*i.e.*, six-day delivery—necessary for this preferential service. The PRC reasoned that if all mail were nonpreferential, then three-day delivery would be feasible, and that the additional fixed costs resulting from maintenance of the six-day schedule could be determined. The primary source of such costs was found in the delivery unit, but the PRC recognized that, with improved data, such costs could be determined for other functions as well. In drawing this inference of causation, the salient feature was overall level of service, not whether, under current practice, the deferral that does take place occurred within any particular function.

Recognition that overall service levels, and not deferrability within one function, provide the key to service related costs also forms the basis for distinguishing the PRC's rejection of the citizens' rate. As explained by Judge Tamm in the companion opinion, that special rate

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[57] *Id.* § 121.2.

[58] R. 3-06807, 3-00936, 4-01460-61.

[59] Brief of ANPA/NNA at 19-20.

was premised on deferrability in the delivery function *only*.[60] The PRC concluded that because such deferral was unlikely to occur in practice, there would be no difference in overall service that would justify an unequal allocation of delivery costs as between citizens' rate and regular first-class mail. On the other hand, in the case of preferential versus nonpreferential mail, there are conceded differences in overall service that do justify disparate cost assignments.

The newspaper publishers, joined by the first-class mail users,[61] make a further argument. For this purpose they assume, in effect, the reasonableness of the PRC model in determining costs that are caused by the need to maintain a six-day delivery schedule. Although the non-preferential classes may not require six-day delivery, in practice they are often delivered without deferral, and so receive the benefit of six-day delivery capacity. By assigning "capacity" costs entirely to the preferential classes, they argue, the PRC gives the nonpreferential classes a "free ride." These parties contend that such a "free ride" is contrary to legal precedent and sound economics. They point to *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945), as prohibiting such a "free ride" by theoretically "interruptible" customers who get the benefit of capacity provided to serve peakload customers. While *Colorado Interstate* does lean against free riders, it does not establish a legal prohibition against assigning all capacity costs to peakload customers. That case rather affirmed the FPC's discretion to require interruptible customers to bear some portion of capacity costs.

In general we agree with the first-class users that there is good reason, in economics and common sense, to call upon nonpreferential classes to contribute to the capacity

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[60] *See* pages 68-71 *infra*.

[61] Various petitioner and intervenor States.

costs used in providing them a benefit.[62] However, as applied to the costs entailed in maintaining a six-day system, the question is not a simple one. There is a question whether and to what extent the users of this nonpreferential mail receive a benefit of value. On the record, we cannot hold that the PRC abused its discretion in choosing as of this ratemaking proceeding not to require the nonpreferential classes to contribute to the differential in capacity costs ascribable to a six-day system.

Various parties attack the PRC for failing to justify fully the operational feasibility of its hypothetical three-day delivery schedule. They also assert that the PRC erred in assuming that all other aspects of postal operations would remain relatively constant under a three-day system and in failing to consider the effects on costs of distortions in the postal system that would result from three-day delivery. The PRC did provide a discussion of the feasibility of the three-day system.[63] While some of

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[62] *E.g.*, 1 A. KAHN, *supra* note 25, at 78.

[63] The PRC hypothesized a three-day system in which half the routes would be delivered Monday, Wednesday and Friday, and the other half would be delivered Tuesday, Thursday and Saturday. Even though each route would be delivered only three days a week, the postal system as a whole would continue to function six days a week. Based on this model, the PRC first concluded that current mail volume could be handled at the delivery unit without causing buildup prior to delivery. The PRC assumed a volume of 2,400 units a week on a set of four mail routes, and that 100 units were currently delivered per route on each of six days. Under the three-day system, the amount delivered on each route would double to 200 units a day, but the amount handled at the delivery unit would remain 400 units per day. PRC App. J at 242-43. The PRC then considered the feasibility of three-day delivery in terms of effect on the current eight-hour work schedule necessary to deliver a given route. Taking into account the additional time necessary to service a route with doubled volume, the PRC found that it would take 11.4 hours to service a route under a three-day system, as compared to eight hours assumed under

its assumptions are, to put it mildly, optimistic, we cannot say that the system is so unrealistic a model as to call into question the rationality of the conception underlying service related costs. A model may be useful for purposes of analysis, though it premises a condition that has not been and indeed cannot be exactly duplicated in real life. A familiar instance is the model of Newton's laws of motion with its (unrealistic) premise of a world without friction.

More substantial is the contention that the Postal Service had an obligation to consider the effect of a three-day system on other functions of the postal system. However, the PRC did not reject the need to make its model as realistic as feasible. Instead, it found as a fact that the other functions of the Postal Service would remain relatively stable, without significant distortion from the institution of a three-day system.[64] That conclusion finds support in the record.[65] It must be remembered that we

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the six-day schedule. The net result was a projected weekly savings of 13.8 hours or 29 percent in the time necessary to service any given route (48 hours per week under the six-day schedule minus 34.2 hours per week under the three-day schedule). To the potential difficulty that no one carrier would or could perform in one day the 11.4 hours necessary to complete the route, the PRC responded:

> On any route's delivery day, a carrier would require 3.4 hours of in-office time and assistance to satisfy an eight-hour day. Since other carriers would not be delivering on his delivery day, the delivering carrier could draw upon one of those other carriers, on his delivery day, and he could assist another carrier on his non-delivery day.

PRC App. J at 244. Presuming this sharing of workload and perhaps some adjustment of routes, one cannot say the PRC model was so unrealistic as to be irrational.

[64] PRC Op. at 113-18.

[65] R. 4-01893-912 (testimony of Postal Service Witness Lynn).

deal here with inferences of causation. The PRC may draw reasonable inferences of causation without resolving all subsidiary issues, especially those that would require extensive and disproportionate effort.

The magazine publishers [66] challenge the reasonableness of the service related cost concept on the ground that the service standards on which it was based do not reflect any determination as to which classes actually "need" six-day delivery and which can therefore be said to "cause" the six-day delivery schedule. They argue that the existing service standards were adopted as the basis for service related costs without investigation into whether the classes receiving preferential service under the standards actually required that preference. Specifically, the magazine publishers contend that magazines require delivery only two days a week; hence, magazines, at least, cannot be said to "cause" six-day delivery.

The issue raised by this contention is substantial, but in the last analysis it does not warrant rejection of the PRC's methodology. While the mail system is bounded by constraints against undue preferences or discrimination, it need not be, and probably could not be, tailored to match perfectly individual customers' perceptions of their own service needs. In mail classification, judgments are properly made that similarities between types of mail or mail users justify their inclusion within a single class, even where there might be differences among them in the service desired. Thus, daily newspapers, which presumably demand prompt delivery, are included in second-class with magazines of various publication frequencies.[67] Their similarities are evident, especially in the context of their joint entitlement to a congressionally mandated preference based on their key characteristics of regularity

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[66] Time Inc. and Magazine Publishers Association.

[67] Domestic Mail Classification Schedule § 200.1(a).

of publication and type of information conveyed.[68] The Postal Service must be afforded broad discretion to manage its operations efficiently by developing service priorities. In making these decisions, USPS need not restrict itself only to considerations of customer need, but may also take into account such operational factors as transportation availability and distribution capabilities. So long as these service priorities are not manifestly unrealistic, USPS is not obliged to undertake a comprehensive review of its service priorities before those priorities may form the basis of cost allocations. In this case, it was not manifestly unrealistic for USPS to conclude that magazines published weekly or more often (and therefore entitled to "red tag" service) would, like daily newspapers, require the prompt delivery accorded by a six-day schedule.

In a similar vein, the magazine publishers and mailers of third- and fourth-class parcels[69] contend that it was arbitrary to assign costs on an all-or-nothing basis depending on whether a class was designated preferential or nonpreferential, when the service priorities as described by witness Jellison form not a simple dichotomy but rather a hierarchial array—with first-class taking precedence over all other classes. The result, these parties contend, is discrimination—the assignment of equal cost responsibility for unequal degrees of service. While there is some merit to this objection, we do not find it fatal in the context of this ratemaking proceeding. USPS and the PRC, in developing the service related cost method, endeavored to meet this court's mandate in *NAGCP I*. In the initial implementation of a new ratemaking approach, some leeway for approximation and estimation must remain. The courts often uphold regulatory actions on

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[68] *See* 39 U.S.C. §§ 3622(b)(8), 3626 (1976).

[69] The Association of American Publishers and Recording Industry Association of America.

the premise that the approximations will be subject to refinement.[70] The rough categorization of service priorities into preferential and nonpreferential was a reasonable first approximation in tracing the costs of providing the various levels of service. That this dichotomy may not suffice in future proceedings is highlighted by the PRC's exhortation to USPS to develop data and methodologies that will reflect more accurately the hierarchy of service priorities. We prefer to leave such efforts at refinement of methodologies in the hands of the PRC.

This approach also serves to dispose of the parcel mailers' further claim of error in the PRC's failure to determine actual operating priorities before assigning costs on the basis of "hypothetical" service priorities. Such a study, they believe, would prove that "borderline" classes—*i.e.*, parcels—are actually afforded nonpreferential treatment. We do not find it unreasonable to draw inferences of causation without detailed studies of actual operating practices, at least in the context of an initial effort. We again note the PRC's request that USPS provide more accurate data on service priorities in future proceedings.

Finally, we do find substance to the claim of American Business Press, Inc. (ABP), an association of publishers of specialized business publications. Despite the fact that preferential or "red tag" second-class mail makes up only 40 percent of all second-class mail, the PRC assigned to all second-class, both preferential and nonpreferential, the service related costs caused by providing preferential service to red tag. We agree with ABP that assignment

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[70] *E.g.*, Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968); Second National Natural Gas Rate Cases, 186 U.S. App.D.C. 23, 70-71, 567 F.2d 1016, 1063-64 (1977), *cert. denied*, 435 U.S. 907 (1978); *see* Atchison, T. & S.F. Ry. v. ICC [Market Dominance], 188 U.S.App.D.C. 360, 377, 580 F.2d 623, 640 (1978).

of service related costs to mail not receiving preferential service raises serious concerns of discrimination.[71] In our preceding discussion, we have accepted, at least for this case, the PRC's adoption of a model based on a dichotomy between preferential and nonpreferential mail, even though that distinction may not entirely reflect actual service priorities. But the failure to distinguish in the assignment of costs between preferential and nonpreferential mail goes contrary to the PRC's own model.

Despite our concern, we decline to disturb the PRC's decision at this time. There is some doubt whether the issue was fully ventilated in the proceedings before the PRC.[72] In any event, the Commission has chosen to deal with the issue as a classification matter, rather than in the context of a ratemaking proceeding. In Docket No. MC76-2, the Commission recently rejected a proposed surcharge on red tag mail, as well as a proposal to eliminate the current restriction on the availability of red tag

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[71] *See* Trailways of New England, Inc. v. CAB, 412 F.2d 926, 933 (1st Cir. 1969); Payne v. Washington Metropolitan Area Transit Comm'n, 134 U.S.App.D.C. 321, 335-36 n.71, 415 F.2d 901, 915-16 n.71 (1968).

[72] The thrust of ABP's presentation to the Commission was not that assigning service related costs to ordinary second-class regular rate was discriminatory *per se*, but that such an assignment would be inconsistent with the Postal Service's citizens' rate proposal, which premised rate distinctions on differences in service related costs within a class. Counsel for ABP stated that if a citizens' rate were rejected, then "a separate rate for deferred nonpreferential periodical mail would not be warranted." R. 2-02927. *See* Rhode Island Consumers Council v. FPC, 164 U.S.App.D.C. 134, 143-44, 504 F.2d 203, 212-13 (1974) ("The agency cannot reasonably be expected to take a hard look unless the parties participate in the task of identifying the hard problems, and of bringing to light pertinent information and analysis bearing on their resolution.").

to periodicals with a frequency of once a week or more.[73] The Board of Governors affirmed this aspect of the Commission's recommended decision, but rejected a recommendation that red tag be incorporated into the Domestic Mail Classification Schedule as a separate subclass of second-class.[74] Both decisions indicated that a reexamination of the question would be appropriate in light of the adoption—subsequent to the development of the record in that proceeding—of the service related cost methodology.[75] The PRC has recently initiated a proceeding, Docket No. MC79-3, to undertake that reexamination.[76] Although, as this discussion reveals, mail classification and postal rate issues are often intertwined, the Act establishes separate, though parallel, procedures for considering each of them.[77] While it is feasible, and perhaps desirable, to consolidate the consideration of classification and rate issues where appropriate,[78] the PRC did not act

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[73] *Opinion and Recommended Decision After Exceptions to Tentative Decision Denying Proposal by the Officer of the Commission to Expand the Availability of Red Tag Service and Institute a Surcharge for Expedited Service* (June 16, 1978).

[74] *Decisions of the Governors of the United States Postal Service re Several Recommended Decisions of the Postal Rate Commission on Proposed Changes in the Domestic Mail Classification Schedule* (Sept. 7, 1978). Judicial review of this decision is currently pending. Pennington v. USPS, No. 78-1899 (D.C.Cir., appeal docketed Sept. 12, 1978).

[75] *Governors Decision, supra* note 72, at 7; *PRC Recommended Decision, supra* note 71, at 21.

[76] Letter from USPS Counsel (Jan. 9, 1979).

[77] *Compare* 39 U.S.C. § 3622 (1976) (postal rates and fees) *with* 39 U.S.C. § 3623 (1976) (mail classifications).

[78] In this proceeding, the Postal Service's citizens' rate proposal was treated as a classification matter as well as a rate question. USPS followed the requirements of 39 U.S.C. § 3623 (1976) and its implementing regulations, 39 C.F.R. § 3001.61-.66 (1978). *See* PRC Op. at 1-2.

arbitrarily in choosing to explore this matter in the context of classification proceedings. We therefore defer to the PRC's pending proceeding where the issue will receive further analysis, with this court's concern in mind.[79]

IV. First-Class Users' Claims

A. *Undue Discrimination Against First-Class Mail*

Several petitioner and intervenor states, large users of first-class mail, mount a generalized attack on both the rate schedule adopted by the Board of Governors in approving the PRC decision, and the cost allocations underlying that rate schedule. The cornerstone of their position is a comparison of the rates charged for allegedly similar pieces of first- and second-class mail receiving identical service. Thus, the rate for mailing a piece of presorted first-class mail weighing four ounces would be 52 cents, while the rate for a piece of second-class red tag mail weighing four ounces would be 10.8 cents or less, depending on the degree of presortation.[80] The States

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[79] *Cf.* Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967) (ripeness doctrine). A further consideration influencing us to stay our hand at this time as to a relatively minor point, is uncertainty about our power to remand only a portion of the decisions under review. The section of the Act providing for judicial review, 39 U.S.C. § 3628 (1976), also declares: "The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision." For other instances of affirmance of a large proceeding notwithstanding doubts about relatively minor points, see Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Trans World Airlines, Inc. v. CAB, 128 U.S.App.D.C. 126, 385 F.2d 648 (1967), *cert. denied*, 390 U.S. 944 (1968).

[80] The second-class regular-rate is a combination of three charges: (1) a three tier per-piece charge varying according to degree of presortation; (2) a flat per pound rate for the editorial, nonadvertising portion of the publication; (3) a per pound rate for the advertising portion varying according to the distance (measured in "zones") from the mailing office.

point to portions of Postal Service witness Jellison's testimony supposedly proving that first-class and red tag receive identical service.[81]

The States claim that this disparity demonstrates discrimination *per se*, since unequal rates are being charged for identical services.[82] They also infer that first-class users are subsidizing the costs of providing second-class service. Adjusting for differences in "cost coverage"[83]

See PRC Op., App. 1 at 7. The States' hypothetically presumed a four ounce piece of second class regular rate mail containing half advertising and half editorial matter, mailed to a point within either zone 1 or 2 (the zones nearest the post office).

[81] In actual practice, second class red tag mail is processed, transported and delivered concurrent with first class mail the majority of the time.

R. 3-00919.

[82] *See* Payne v. Washington Metropolitan Area Transit Comm., 134 U.S.App.D.C. 321, 335-36 n.71, 415 F.2d 901, 915-16 n.71 (1968).

[83] "Cost coverage" is the percentage of the costs of providing a class of mail service that the rates for that class generate. It is an index of the allocation of costs remaining after attribution and assignment under the residual criteria established by 39 U.S.C. § 3622(b). Because mail classes are required, with a few minor exceptions, 39 U.S.C. § 3626(a), to meet the attributable and assignable costs to them, 39 U.S.C. § 3622(b)(3), cost coverage will exceed 100 percent. In Docket No. R77-1, the PRC allocated the residual costs in such a way as to give first-class a cost coverage of 124 percent, and second-class regular rate a cost coverage of 100 percent. *See* PRC App. G, schedule 2. To reach its rough figure of a 40 cent actual cost of mailing a four ounce first-class piece, the states compared the 124 percent cost coverage figure for first-class to the 100 percent that represents attributable and assignable costs, and concluded that 80 percent of a given first-class rate could be said to reflect the actual costs of providing that service. Eighty percent of the 52 cent rate for a four ounce piece equals approximately 40 cents. *See* Brief for Petitioner and Intervenor States at 24-25.

between first- and second-class rates, the States surmise that the actual cost—under the PRC's cost calculation—of mailing the four ounce first-class piece is approximately 40 cents and the cost of the comparable second-class red tag service is 10 cents. To the states, "simple common sense" suggests that, since both classes receive identical service, the rate for second-class red tag service cannot be covering the true cost of providing that service.

This argument does not undercut the reasonableness of the rate schedule. In the first place, it is not at all clear from the record that the service accorded red tag mail is identical to that given first-class. Jellison's testimony was that while second-class red tag mail is processed, transported and delivered concurrently with first-class mail the majority of the time, red tag was deferred as against first-class in heavy volume periods.[84] This deferrability undercuts any easy conclusion that the services are identical, even though its cost consequences are unclear, since relative deferrability within the preferential category did not enter into the PRC's model for assigning service related costs.[85] Further, in handling first-class mail, USPS must perform a number of functions—such as pickup at a multitude of locations (mailboxes, office buildings)—that are not required for handling second-class, which must be delivered presorted to the post office. It is accordingly likely that the cost of handling second-class is lower than the cost of handling first-class mail.

A more fundamental difficulty is that the States' charge of a gross disparity in the rates charged first-class and second-class pieces of identical weight presumes that cost responsibility is a function only of weight, and that weight alone is the proper basis for comparison. Yet, depending on the particular cost segment, cost responsi-

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[84] R. 3-00919.

[85] *See* pages 32-35 *supra*.

bility may result from any one or a combination of a number of factors, including not only weight but such factors as cubic volume and number of pieces mailed. The PRC employs these factors as "distribution keys" to distribute the costs of any one segment among the classes based on an inference as to causation of the costs of providing that segment of service to that particular class.

It may be enlightening to compare the rates charged the average pieces of first-class mail and second-class red tag mail. The average weight of all first-class letters and sealed parcels is 0.5 ounce;[86] the rate for this average piece would be 15 cents. The average weight of second-class regular rate publications is six ounces,[87] and using a piece comparable to that hypothesized by the states,[88] would be charged a rate of approximately 13.1 cents or less. After adjustment for cost coverage similar to that made by the States in their comparison, the cost to mail a first-class letter is 12 cents, to mail the second-class piece 13.1 cents. When comparison is made on a per piece basis, the claims of discrimination and subsidization lose their force. The point is not that this comparison proves absence of discrimination, but that reliance on any one key as the only test is inadequate.

We are sensitive to the first-class users' concern that the historical discrimination against first-class mail—a concern that permeated the passage of the Act and the decision in *NAGCP I*[89]—may persist. We do not ad-

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[86] R. 4-00539 (table).

[87] R. 4-00540.

[88] *See* note 80 *supra*.

[89] *See* Lewis Publishing Co. v. Morgan, 229 U.S. 228 (1913); *NAGCP I*, *supra*, 186 U.S.App.D.C. at 348-50, 569 F.2d at 587-89; S. REP. No. 912, 91st Cong., 2d Sess. 11 (1970); 116 CONG.REC. 21,712 (1970) (remarks of Sen. McGee).

vance these defects in the States' model as demonstrating decisively that first-class is not the subject of discrimination and does not subsidize other classes. But they do expose in high relief the States' failure to relate their claims to the extensive cost data relied upon by USPS and the PRC. Artificial comparisons cannot substitute for a showing that the PRC's specific cost allocations were not supported by substantial evidence.

B. *Use of "Value of Service" Criteria*

The States make an additional argument that the PRC relied upon "value of service" criteria to an impermissible extent, in contravention of the command of *NAGCP I*. Under a "value of service" approach costs are allocated not by tracing of cost causality, but by judgments as to the value of the service to the user or "what the traffic will bear."

We find the States' complaint hard to comprehend. It is directed at the testimony of Postal Service witnesses Sobin and McCaffrey. Sobin testified about projections of mail volume in the test year and estimates of "price parameters," or elasticities of demand, for the various classes of mail and mail services. These latter estimates of elasticity both entered into the projections of volumes in the test year before rate changes, and provided a basis for estimating the reduction in volume that would result from the increased rates recommended by the rate design witness.[90] That witness was McCaffrey, who determined the appropriate cost coverages for the various mail classes and subclasses, applying the rate criteria of 39 U.S.C. § 3622(b). According to McCaffrey, "Based on my proposed rates, witnesses Sobin and Kluttz [the Postal Service's revenue requirement witness] computed after-rates volumes and revenues." [91]

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[90] R. 4-00556.

[91] R. 4-01567.

In determining the appropriate cost coverages, which measure the allocation of residual costs after attribution and assignment, McCaffrey applied the discretionary criteria of § 3622(b), including "the value of the mail service actually provided each class or type of mail service to both the sender and the recipient." 39 U.S.C. § 3622 (b)(2) (1976). We do not understand the States to challenge the use of "value of service" in the allocation of residual costs to the various classes. Rather, they seem to challenge the reliance, in the initial determination USPS' costs, on projections of the volumes that will be mailed at the proposed increased rates, because these volume projections are derived by applying estimated elasticities of demand to the projected test year volumes at the rates prevailing before the increases. Since any estimate of demand elasticity will incorporate judgments as to the value to the consumer of obtaining the service, reliance on these estimates permits "value of service" to creep somehow into the process of cost attribution and assignment.

Giving the States' argument the most generous cast, we nonetheless find it without merit.

Contrary to the States' suggestion, it is not at all clear that volume projections based on demand elasticity enter into the process of cost attribution and assignment. Conceptually, attribution and assignment are functions discrete from determination of the revenue requirement or designation of the appropriate rate schedule. By definition, attributable and assignable costs vary, at least by inference, with volume. Unless there is an assumption of significant economies of scale, not here posited, the process of attribution and assignment of costs is not materially affected by total volume projection; whatever the volume, a rate will recover attributable and assignable costs. Total volume projections enter the calculation because it is necessary to design the rate schedule to recover not only "variable" (attributed and assigned)

costs but also "institutional" (residual) costs. It can only be determined whether a given rate schedule will recover all institutional costs when there is an accurate projection of the volume that will be generated under that schedule. Demand elasticity is pertinent only in the stage of designing rates to recover residual costs, and that is precisely the area where the statute permits "value of service" to be considered.

Even if, for purposes of discussion, one were to accept the States' supposition that demand elasticity enters into cost attribution and assignment, such an effect would be incidental to analysis based on volume estimates. Volume estimates are vital to sound ratemaking. It is difficult to envision a ratemaking scheme that does not require estimates of volume, and it would be absurd to preclude the use of volume projections because their ascertainment requires some consideration of the relative value to consumers of the services.

Nothing in *NAGCP I* requires such a result. The court condemned the overt use of "value of service criteria," *i.e.*, assigning almost half of the costs of the Postal Service on the basis of the relative inelasticities of demand of the mail classes.[92] The court commended the use of cost-of-service principles. But whether the costs so ascertained, and rates based thereon, will suffice to cover revenue needs naturally requires volume projections, even though these involve some ascertainments of demand elasticity. This is inherent in any rational scheme of cost allocation.

V. Second-Class Users Claims

Having been concerned to this point with the broad sweep of the PRC's performance under the Act, we now

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[92] *NAGCP I, supra*, 186 U.S.App.D.C. at 343-44, 569 F.2d at 583-84; pages 17-19 *supra*.

consider the lacunae of three specific decisions concerning second-class mail.

A. *Limitation of Presort Discount*

As noted above, *supra* note 80, the second-class regular rate (for mailings of 5,000 or more copies, mailed outside the county of publication) consists of three separate charges: a piece rate, a poundage rate for the editorial portion of the publication, and a poundage rate for the advertising portion that is "zoned" according to distance. In Docket No. R77-1, the Commission adopted for the first time a three-tier piece rate that varies according to the degree of presortation.[93] Mail presorted to carrier route is charged a piece rate of 4.4 cents. Mail presorted to five digit zip code (or three digit zip code for certain cities) is charged a piece rate of 5.4 cents. All other second-class regular rate is charged a piece rate of 7.0 cents.[94] Although Postal Service regulations require that all second-class mail be presorted to the greatest extent possible,[95] the two presort "discounts" are available only where the presorted mail is sorted into sacks either at least one-third full or weighing at least 20 pounds.

American Business Press (ABP) attacks the limitation on eligibility for the presort discount as discriminatory against smaller publications that cannot fill one-third sacks when the presorting is to five digit zip codes, either because of low circulation or wide geographic dispersion. Record evidence suggested that only a small percentage of all publications would be eligible for the discounts,[96] although approximately 77 percent of regular

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[93] PRC Op. at 303-32.

[94] *Id.*, App. 1, schedule B-4.

[95] Postal Service Manual § 125.326.

[96] OOC Witness Bentley cited a USPS study indicating that 131 publications (1%) would benefit, while 12,662 others would not. R. 4-02621.

rate mail, by volume, would be eligible.[97] ABP argued before the Commission that the proper measure of eligibility for the presort discounts should be the six-copy bundle, the standard prescribed by postal regulations for separating bulk mailing from individual mailings.

We find the Commission's limitations on eligibility supported by the evidence. Postal Service witness McCaffrey stated that the one-third sack requirement in presortation was a standard USPS requirement.[98] Witness Madison found the presort discount justified by cost savings.[99] His study was based, however, on the assumption of a one-third sack limitation. The Commission noted that there was "no correlation between the Madison cost and volume data and the presortation of six piece bundles which is the eligibility requirement sought by ABP." [100] ABP attacks as "not explained" the reliance on the Madison study.[101] Its position presumes that the effect on USPS costs of presortation to six-copy bundles would not differ from the cost effects of presortation to one-third sacks. We cannot ignore or gainsay the likelihood that

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[97] PRC Op. at 325.

[98] PRC Op. at 330.

[99] It should be noted that this reliance on cost considerations in designing second-class rates is not a product of the attribution/assignment process mandated by 39 U.S.C. § 3622(b)(3). That subsection extends only to the allocation of costs to the various classes. Rate design within any class is subject only to consideration by the Commission of the remaining criteria enumerated in § 3622(b). In the case of the second-class per piece rate, the Commission concluded that cost considerations were relevant under the criterion of § 3622(b)(6)—"the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect on reducing costs to the Postal Service." PRC Op. at 316-17.

[100] PRC Op. at 330.

[101] Brief for ABP at 30.

the significantly smaller six copy bundle would entail greater handling costs than the one-third sack. Since precise cost data was lacking with regard to the six copy bundle, the PRC was justified, at least in its first attempt at devising a second-class presort discount, in choosing to limit the availability of the discount to those mailings for which it had reliable data.

We find no basis for ABP's claim that, in adopting the second-class rate structure, the PRC focused on one rate-making criterion—the degree of preparation performed by the mailer [102]—to the exclusion of other factors, particularly the effect of rate increases on mail users.[103]

We read the PRC's opinion as reflecting a full consideration of the pertinent factors. The Commission expressly took into account the interests of small publications—though not to the degree ABP desires—by modifying the presort discount, limited to mailers using five digit zip codes, so as to be available as well to those using three-digit city zip codes (though still subject to the one-third sack restriction).[104] The Commission also rejected a zoned editorial charge, because small publications are least able to avoid the highest zone charges through the device of multiple points of entry.[105]

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[102] 39 U.S.C. § 3622(b)(6) (1976).

[103] 39 U.S.C. § 3622(b)(4) (1976).

[104] PRC Op. at 328-29.

[105] ABP claims further that the second-class presort discount, or at least its limitation to the larger one-third sack volumes, violates the First Amendment and the equal protection clause by imposing a "surcharge" on publishers based on circulation. This argument is without merit. ABP places principal reliance on Grosjean v. American Press Co., 297 U.S. 233 (1936). Yet in that case a tax that was imposed on newspapers on the basis of circulation was struck down not because of differential impact, but because it was a "deliberate

B. *Average Weight of Second-Class Publications*

The magazine publishers attack as contrary to the evidence the PRC's adoption of the Postal Service's estimate that the average weight of a second-class regular rate publication in the test year would be 6.1 ounces.[106] They assert that this figure represents an unjustified extrapolation from a recent downward trend in the average weight of second-class publications. Invoking a survey of Magazine Publishers Association (MPA) members, the publishers argue that the downward trend has been reversed, and that average weight has actually increased. The result is a $29 million underestimation of the revenues that will be generated by the two poundage charges, which together account for 52 percent of second-class regular rate revenues.[107]

It is not our function to weigh again evidence that was carefully considered by the PRC.[108] The Commission discounted the MPA study as "inconclusive" because its sample—MPA members—was not necessarily representative of all second-class publications. The Commission further noted that the seeming downward adjustment of average weights in the test year—to 6.1 ounces from the average weight of 6.2 ounces found in fiscal years

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and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled." *Id.* at 250.

There is here, of course, no suggestion that the presort discount is a device to limit circulation of small publications. As a reflection of perceived cost relationships, it is entirely permissible. *See* Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[106] PRC Op. at 289; R. 4-00786 (table).

[107] PRC App. G, schedule 3, at 7-8.

[108] *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607 618-21 (1966); Environmental Defense Fund v. EPA, 179 U.S.App.D.C. 43, 48-49, 548 F.2d 998, 1003-04 (1976), *cert. denied*, 431 U.S. 925 (1977).

1976 and 1977—was not a downward extrapolation at all, but was merely the product of "rounding the detail actually used in the projection." [109] Finally, the Commission concluded that any increase in revenues resulting from increased weight would be offset, at least partially, by increased costs, and that, even assuming such a revenue excess, the resulting second-class regular rate cost coverage of 105 percent would not be unreasonable.[110] Though the evidence is in conflict, a substantial evidentiary basis for the PRC's decision is present, and we have no warrant to substitute the court's assessment of the evidence for the considered judgment of the Commission.

C. *Attribution of "Individual Load Time"*

The magazine publishers also attack the PRC's conclusion that "individual load time" varies entirely with volume and therefore is 100 percent attributable. "Load time" generally is "the time spent depositing mail in delivery receptacles." [111] Load time is divided into "batch load time" and "individual load time." Batch load time is the "time spent at delivery points placing batched

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[109] PRC Op. at 289.

[110] *Id.* at 289-90.

[111] R. 4-00318. The costs of city delivery carriers are divided between in-office costs (Cost Segment VI) and out-of-office or street function costs (Segment VII). In-office costs are those entailed in sorting, placing mail in sequence, "marking up" mail (*e.g.*, noting changes of address), and loading mail into vehicles. The street function, in turn, is divided into several subfunctions. "Travel time" is the time spent going from the carrier station to the first delivery point and back to the station from the last delivery point. "Route time" is the time spent by the carrier traversing the active portion of his route, but not including the time spent deviating to the delivery points. "Access time" is the time the carrier spends going to and from each delivery point. "Load time" is the time spent handling mail at the delivery receptacles and the time spent at relay and collection boxes.

letter size mail in receptacles or otherwise delivering mail in batches." [112] Individual load time is the "time spent at delivery points placing individual pieces of mail into receptacles or otherwise delivering individual pieces." [113]

Since letter-size mail is "batched," individually loaded mail consists primarily of second-class publications. Because, in theory, individual loading requires a separate step for each piece, the Commission has consistently found it 100 percent variable with volume, and has attributed individual load time costs, primarily to second-class. The magazines allege that this attribution is patently arbitrary because it proceeds from an assumption that a carrier at a delivery point will load batches and magazines in separate steps, rather than by first combining the magazine with the batch and placing them into the receptacle together.

There is some force to the magazines' position. The Commission concluded that load time includes "all time involved handling mail at the receptacle." [114] Under this view, even if the magazines were correct in their point, load time would include the time spent combining the batches and the individual pieces. This does not entirely jibe with the definitions of load time, which seem to restrict that function to the act of placing mail in the receptacle. The problem appears to stem from a deficiency in accurate data as to the proportion of second-class regular rate mail that is loaded individually,[115] and uncertainty as to where in the cost model to account for the steps of combining the individual pieces and batches.[116]

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[112] R. 4-00326.

[113] R. 4-00327.

[114] PRC App. J at 98.

[115] *Id.*

[116] PRC App. E at 19.

Despite some misgivings, we are not inclined to remand on this point alone, in view of its relative lack of consequence and the fact that the PRC has insisted upon improved data in future proceedings. Postal ratemaking continues to evolve and we cannot yet expect USPS and PRC to have gleaned every bit of data and developed every model to perfection. Considering the PRC's immense task in digesting huge quantities of data and meeting the requirements of the Act, we believe it a sound approach to forgive such minor transgressions.

VI. Conclusion

We reemphasize our general satisfaction with the Postal Service's and the PRC's performance in the cost allocation aspects of this ratemaking proceeding. In the face of a difficult task, they have proved responsive and responsible. By this we do not intimate, nor do we read the PRC opinion so as to suggest, that the process may remain static. Further improvements are feasible, and expected. That is not only our hope but our premise, and it is on that premise that we affirm the cost allocation decisions.

TAMM, *Circuit Judge*: We are called upon to review decisions of the Board of Governors of the United States Postal Service (Governors) [1] approving the Postal Rate Commission's (PRC) recommended decision [2] in docket no. R77-1, a ratemaking proceeding.[3] The petition for review gives rise to numerous issues involving the Postal Reorganization Act of 1970 (Act) [4] and interpretations thereof.[5] We have considered challenges to postal cost

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[1] Pursuant to 39 U.S.C. § 3625 (1976), the Governors issued two decisions in docket no. R77-1: (1) Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services (May 19, 1978) (Governors' Rate Decision); and (2) Decision of the Governors of the United States Postal Service on Changes in the Domestic Mail Classification Schedule Re Citizens' Rate Mail (May 19, 1978) (Governors' CRM Decision). These two decisions are contained in Volume I of the four volumes comprising the action of the Governors.

[2] Postal Rate Commission's Opinion and Recommended Decision, docket no. R77-1 (May 12, 1978). Citation to this decision and its appendices will be indicated in the same manner employed by Judge Leventhal in the companion opinion, *e.g.*, "PRC Op.," "PRC App. B."

[3] As pointed out in the companion opinion at 10, docket no. R77-1 is the fourth general ratemaking proceeding under the Postal Reorganization Act of 1970 (Act), Pub. L. No. 91-375, 84 Stat. 719 (codified throughout 39 U.S.C. §§ 101-5605 (1976)). *See* companion opinion at 10 n.3, for a summarized sequence of prior ratemaking proceedings and judicial review thereof.

[4] *See* note 3 *supra*.

[5] Pursuant to the Act, this court has reviewed prior ratemaking proceedings in National Ass'n of Greeting Card Publishers v. USPS (*NAGCP I*), 569 F.2d 570 (D.C. Cir. 1976) (per curiam), *vacated as to other issues*, 434 U.S. 884 (1977); Association of Am. Publishers, Inc. v. Governors of USPS, 485 F.2d 768 (D.C. Cir. 1973). *See* companion opinion at 10 n.3.

methodology [6] and certain additional claims [7] in the companion opinion penned by Judge Leventhal. We now turn to three final areas of the PRC's and Governors' actions which are questioned on review: (1) the rejection of the citizens' rate mail (CRM) proposal; (2) the provision in the revenue requirement for recovery of accumulated losses; and (3) the imposition of constraints on fourth-class mail rates found to be cost-justified. We treat these challenges *seriatim*.

I. Citizens' Rate Mail

A. *The CRM Proposal*

The Governors initiated the CRM proposal by authorizing [8] the United States Postal Service (Postal Service) to request a recommended decision on a change in the classification schedule that would lead to the adoption of a new subclass for citizens' rate mail, with appropriate rates.[9] CRM, as proposed by the Postal Service, would be a separate first-class service to be used by individuals for the mailing of their personal correspondence. Users of CRM would be entitled to a lower rate of thirteen cents

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[6] The Postal Service's cost methodology, in general, involves the allocation of costs among various classes of mail. *See* companion opinion at 27-45 for a discussion of assignment of service-related costs to certain classes of mail.

[7] These various claims include: (1) discrimination against first-class mail; and (2) a challenge to certain specific cost attributions and rate decisions involving second-class mail. *See generally* companion opinion at 45-58.

[8] *See* Governors' CRM Decision at 1-2.

[9] The Governors stated that they authorized this request "after being advised by postal management that the President had stated that he believed it would be in the public interest to pursue the concept of a citizens' rate for the use of consumers. . . ." Governors' CRM Decision at 2.

in exchange for service inferior, to some degree, to regular first-class service, which would be available at a higher rate of sixteen cents. CRM would have to comply with standard size restrictions and be fully zip coded, and would be denoted by a special stamp.

According to the Postal Service's proposal, all first-class mail would be treated alike prior to the delivery stage of the mail process. However, CRM would be "deferrable" in the delivery function.[10] If exigencies required, mail carriers would separate the CRM mail from the first-class mail at the delivery unit, and set aside sufficient CRM to alleviate the immediate delivery problem.[11] While delivery of the remaining regular first-class mail would be accomplished on the first delivery trip, delivery of the segregated CRM would be deferred until the second delivery trip.

The PRC held prolonged hearings on the CRM proposal, and considered briefs, comments filed, and oral argument by the parties to the proceedings and numerous intervenors.[12] The PRC concluded that the evidentiary record did not support the implementation of a CRM

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[10] *See* PRC Op. at 195; *see also* companion opinion at 36-37.

[11] Possible situations necessitating delivery deferral, cited by Postal Service witness Jellison, included "a transportation breakdown, freak weather conditions and abnormally heavy household-to-household mailings." PRC Op. at 196.

[12] The establishment of CRM was supported by the National Association of Greeting Card Publishers (NAGCP), the Officer of the Postal Rate Commission, twelve intervenor states, the President of the United States, the Council of Senior Citizens, and the American Coalition of Citizens with Disabilities.

The CRM proposal was opposed by Reader's Digest Association, Inc.; Association of American Publishers, Inc.; Direct Mail/Marketing Association; Magazine Publishers Association, Inc.; Time Inc.; Mail Order Association of America; and Parcel Shippers Association.

service,[13] as requested by the Postal Service, and did not establish that the CRM proposal would meet the service, ratemaking and classification requirements [14] of the Act. As a result, the PRC recommended to the Governors that the CRM proposal not be adopted, and that the regular first-class mail rate be increased only to fifteen cents rather than sixteen cents, as proposed. One week later, the Governors approved the PRC's recommended decision.[15]

The National Association of Greeting Card Publishers (NAGCP)[16] makes a multi-pronged attack on the administrative decisions declining to adopt the CRM proposal. NAGCP contends that the Governors abused their discretion in approving the PRC's recommended decision after finding it not fully acceptable. NAGCP also directly challenges the PRC decision on narrower grounds. NAGCP alleges the PRC erred in determining that: (1) the proposed separate citizens' classification was not justified on the record before the agency; and (2) CRM must bear service-related costs, and the revenue and cost estimates before the PRC were too uncertain.

B. *Governors' Alleged Abuse of Discretion*

NAGCP bases its general objection to the Governors' ratification of the PRC rejection of the CRM proposal on qualifying language employed in the Governors' decision. Although the Governors found that the Commissioner's various opinions did not "add up . . . to a fully

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[13] PRC Op. at 182.

[14] *Id.* at 183.

[15] *See* note 1 *supra.*

[16] Petitioner NAGCP leads the attack against the rejection of the CRM proposal. Intervenor Reader's Digest Association, Inc. and the Postal Service defend the Governors' and PRC's action regarding the CRM proposal.

acceptable analysis" [17] and that the PRC was "less than wholly persuasive," [18] the Governors nevertheless approved the PRC decision "with reservations on part of the Commission's analysis." [19] According to NAGCP, the Governors abused their discretion by approving an unacceptable decision.

However, contrary to NAGCP's assertion, the Governors did not approve a decision they found unacceptable. The mere fact that the Governors found the PRC decision to be not "totally acceptable" or "less than wholly persuasive" does not vitiate the Governors' approval. Adherence to NAGCP's line of argument would mandate the Governor's rejection of any PRC decision with which the Governors were not totally satisfied. Such a mandate is unsupported by logic or by statute. The statutory provision applicable to the Governors' action, 39 U.S.C. § 3625 (1976), specifically allows for varying degrees of acceptance or rejection of a PRC recommended decision.[20] The Governors were not forced to choose between total acceptance or total rejection of the PRC decision. They could have, under protest, allowed the recommended decision to take effect and either sought

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[17] Governors' CRM Decision at 2.

[18] *Id.* at 5.

[19] *Id.* at 1.

[20] 39 U.S.C. § 3625(a) (1976) states that "the Governors may approve, allow under protest, reject, or modify" the PRC's recommended decision. The Governors' failure to remand the PRC decision rejecting this CRM proposal need not be the death knell of the CRM concept. The Governors indicated their willingness to authorize, in the future, a Postal Service request for a recommended decision on a citizens' rate proposal, which does not limit the subclass to personal correspondence from individuals but draws a distinction between business originated mail and mail sent by individuals. *See* Governors' CRM Decision at 4.

judicial review or returned the recommended decision to the PRC for reconsideration.[21] The Governors alternatively could have chosen to modify the PRC decision themselves. The Governors obviously were not sufficiently dissatisfied with the PRC decision to reject it, allow it under protest, or modify it. We decline to add the judicial veneer of a non-statutory requirement that the Governors find a PRC decision "wholly acceptable" in order to approve it.[22]

C. *Specific Attacks*

NAGCP attacks the PRC's rejection of the CRM proposal as violative of the classification [23] and ratemaking [24] provisions of the Act. The Governors' order, which is the subject of our review, interprets the PRC rejection of the CRM proposal as resting on two basic grounds, only one of which they question as less than wholly persuasive. The Governors read the PRC decision as boiling down to a "recommendation that (1) the record does not support a finding that 'individuals' is a proper grouping for *classification* purposes, and therefore, the proposal violates [39 U.S.C.] § 403(c), and (2) the proposed *rates* for citizens' rate mail do not meet the requirements of [39 U.S.C. §] 3622(b)(3)." [25]

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[21] 39 U.S.C. § 3625(c) (1976).

[22] *See generally* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 545-46 (1978) (court may not require more than the minimum statutory procedures or impose procedures designed to achieve the "best" result).

[23] 39 U.S.C. § 3623 (1976). *See also* 39 U.S.C. § 403(c) (1976).

[24] 39 U.S.C. § 3622 (1976).

[25] Governors' CRM Decision at 3 (emphasis added). 39 U.S.C. § 403(c) provides:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall

1. *CRM as a Separate Classification*

The PRC's conclusion that the CRM proposal creates an impermissible classification under section 403(c) is based on two findings: (1) the record reveals no material service distinctions from regular first-class mail justifying a separate classification; and (2) even assuming *arguendo* that a material service distinction exists, the record does not support a finding that household users are a special group qualified for separate classification.[26]

The PRC split over the question whether deferrability of CRM justified a separate classification.[27] The Gov-

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not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

See companion opinion at 14-15 n.13 for the full text of 39 U.S.C. § 3622(b) (1976).

The PRC recommendations rest on its specific conclusions that: (1) CRM, as proposed, would provide essentially the same service as first-class mail but at an unjustified lower rate; (2) CRM rates, as proposed, would not meet costs; (3) service related costs should be assigned to CRM, as proposed, which receives essentially the same service as first-class mail; (4) the revenue reduction resulting from CRM has been understated; and (5) CRM is not necessary to meet the needs of people in their personal letter correspondence. PRC Op. at 183-84.

[26] PRC Op. at 193.

[27] The plurality, Commissioners O'Doherty and Villarreal, noted that the only possible diminution of service for CRM, as compared with regular first-class mail, would occur at the delivery stage. Up to that point, CRM as proposed would be processed and transported on a commingled basis with regular first-class mail. If extreme circumstances warranted

ernors found that the deferrable feature of the CRM proposal distinguished it from regular first-class mail for classification purposes.[28] The Governors therefore considered the alternate PRC ground for its determination that CRM may not be separately classified, *i.e.*, a subclass for use only by individuals is unjustified.[29]

According to the Governors, the PRC inappropriately phrased the crucial classification question as whether 39 U.S.C. § 101(a) (1976)[30] accords a "special status"

(*see* note 11 and accompanying text *supra*), first-class mail would be "riffled" to remove sufficient CRM to alleviate the delivery problem and the CRM would be deferred until the next delivery trip.

The record contains evidence that, barring these unforeseen circumstances, CRM service, as proposed, would be "virtually the same" as regular first-class mail service and "would not be deferred very often." PRC Op. at 197. Further testimony revealed that, "'[a]s a practical matter, there will be little if any discernible difference in the service provided this [CRM] mail.'" *Id.* (quoting letter from Rep. Robert Nix, Chairman of House Committee on Post Office and Civil Service (July 19, 1977)). Moreover, even when these infrequent circumstances would require deferral of CRM, the deferral would involve, at most, a one-trip delay.

Nevertheless, Chairman DuPont believed that the service guaranteed for regular first-class mail sufficiently distinguished it from service proposed for CRM, to support a separate classification. Concurring opinion of Chairman Dupont at 3-6. Vice Chairman Bright also believed that CRM, as a distinct service, demands a separate classification. Dissenting opinion of Vice Chairman Bright at 4-5. (These separate opinions are placed at the end of Volume 1 of the PRC Opinion and Recommended Decision.)

[28] The Governors ruled that the deferrable feature of CRM distinguished it from regular first-class mail on grounds of both speed and reliability. Governors' CRM Decision at 3.

[29] *Id.*

[30] 39 U.S.C. § 101(a) (1976), which defines postal policy, provides, in part, that "[t]he Postal Service shall have as

to "personal correspondence from individuals." [31] Rather, the issue is whether a distinction might be drawn between business originated mail and mail sent by individuals. The Governors found that section 101 was hospitable to such a distinction.[32]

The Governors found the PRC's reasons for its rejection of the CRM proposal as an impermissible classification not wholly persuasive, but did not find the classification issue to be dispositive. Thus, we need not endorse nor condemn the PRC classification conclusion. As noted by the Governors, the statutory scheme may well be hospitable to CRM as a separate classification, and our declination to reach this question does not, by any means, presage a future rejection of a future CRM proposal.

2. *CRM Rates*

After reviewing the PRC classification decision, the Governors considered the remainder of the issues that attended the CRM rate proposal—issues concerning the assignment of service related costs (SRC) to CRM and the record's uncertainties in the subclass' volume, revenue, and effect on postal operations.[33]

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its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people."

Consideration of this policy in classification decisions is mandated by 39 U.S.C. § 3623(c), which provides, in part, that "[t]he Commission shall make a recommended decision on establishing or changing the [mail classification] schedule in accordance with the *policies* of this title. . . ." (emphasis added).

[31] Governors' CRM Decision at 4.

[32] *Id.*

[33] *Id.*

a. *Assignment of Service Related Costs to CRM*

In determining the unit costs for CRM, the Postal Service did not assign to CRM any service related costs.[34] The PRC decided that exemption of CRM from SRC assignment would be proper only if "CRM could be deferred on an operational basis to meet Postal Service needs should appropriate occasion therefore arise." [35] Based on the evidence, the PRC concluded that CRM is not easily separable from "preferential mail," which requires immediate delivery,[36] and thus, not readily susceptible to actually being deferred at any point in the mailstream.[37] The PRC decided that insufficient operational diminution in first-class service for CRM existed, due to the likely infrequency of deferral of CRM [38] and the resultant minimal delay in delivery, to warrant the total exemption of CRM from SRC.[39]

NAGCP claims that the same material service differences which persuaded the PRC to endorse assignment of SRC to preferential mail and nonassignment of SRC to nonpreferential mail [40] support assignment of SRC to regular first-class mail and nonassignment of SRC to deferrable CRM. Therefore, NAGCP asserts, the PRC discriminatorily assigned SRC across the board to all first-class mail, while drawing finer and more accurate

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[34] *See* companion opinion at 10-11.

[35] PRC Op. at 211.

[36] *See* companion opinion at 32-33.

[37] In this respect, CRM may be contrasted with nonpreferential mail, which is susceptible of actually being deferred at any point in the mailstream. PRC Op. at 211.

[38] *Id.* at 199.

[39] *Id.* at 213.

[40] *See* companion opinion at 36.

distinctions in its assignment of SRC to preferential as opposed to nonpreferential mail.[41]

b. *Uncertainties in Revenue and Cost Estimates*

The PRC determined that uncertainties in the record on CRM's volume, revenue, and effect on postal operations, factors which go to the heart of a rate decision under 39 U.S.C. § 3622(b)(3) and (4),[42] made informed consideration of the CRM proposal impossible. For example, the PRC determined that there was insufficient evidence in the record to estimate CRM volume; and, therefore, it could not estimate the loss in regular first-class mail revenues that would result from CRM, or the revenue that would be produced by CRM itself.[43] The PRC also determined that the Postal Service's cost estimates for CRM were questionable.[44] In general, the PRC concluded that the evidence revealed an extreme range of unlimited uncertainty as to revenue and cost estimates.[45]

According to NAGCP, the PRC's alleged requirement for certainty in estimates was arbitrary and capricious. More specifically, NAGCP points to the inherent uncertainty in estimates for new utility services and to the possible formulation of a compromise estimate based on the existing evidence.

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[41] *See id.* at 37.

[42] *See id.* at 14-15 n.13 for full text of 39 U.S.C. § 3622(b).

[43] PRC Op. at 203-06. The Postal Service's volume estimates were based on studies which the PRC found to be insufficiently similar to the CRM proposal. *Id.* at 205.

[44] *Id.* at 209-17. *See* note 43 *supra.*

[45] PRC Op. at 219.

c. *Judicial Review*

It is the court's function, at this juncture, to determine whether substantial evidence in the record justifies the PRC's rejection of the CRM proposal on the basis of uncertainties in volume, revenue and cost estimates which would render application of the ratemaking criteria in section 3622(b) a futile exercise. It is clear that the PRC did not create an insuperable barrier of certainty for the CRM proposal. It merely concluded that adequate information was not available in the record by which a reasonable estimate could be made. The lack of information is understandable in light of the late stage at which CRM was introduced.[46] The PRC concluded that the Postal Service's revenue estimates were based on questionable studies,[47] and that questions concerning assignment of SRC to CRM eroded the Postal Service's cost estimates. In light of these uncertainties in the record, we conclude that the PRC's rejection of CRM was based on substantial evidence.

The issue whether *vel non* CRM should bear SRC further obfuscates the uncertain CRM cost estimates. We are unpersuaded by NAGCP's attempt to analogize nonassignment of SRC to nonpreferential mail, with that of nonassignment of SRC to CRM. The overall level of service received by nonpreferential mail justifies disparate SRC assignments,[48] but there are no comparable

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[46] According to Chairman DuPont, "[i]t is common knowledge that the CRM idea was suggested at a late stage in the preparation of this rate request. Clearly the Service could not, in the time available, undertake the foundation, baseline studies which ideally should precede such a major new proposal." Concurring opinion of Chairman DuPont at 11.

[47] *See* note 43 *supra.*

[48] *See* companion opinion at 36-37. On the record of this ratemaking proceeding, we cannot hold that the PRC abused its discretion in not assigning SRC to nonpreferential classes. *See id.* at 38.

differences in overall levels of service between the proposed CRM and regular [49] first-class mail. In contrast to its finding on nonpreferential mail, the PRC found that the infrequency of deferral of CRM and the resultant minimal delay, did not support the necessary finding that CRM could be deferred on an operational basis. Thus, it concluded that CRM as proposed should bear at least a portion of SRC. This is not to say that an across-the-board assignment of SRC to all first-class mail, both to CRM and regular first-class, is warranted. We have noted our concern, in the context of the treatment of "red tag" mail and other regular rate second-class, that the assignment of SRC reflect service priorities within a class.[50]

We need not decide whether CRM should be totally assigned, or exempt from, SRC. Rather, we find that if CRM is to bear SRC, such assignment should be finely tuned. The record clearly does not provide complete data to compute a ratio of assignable SRC to CRM. The fact that the PRC declined to take the initiative to formulate such a ratio based on the Postal Service's estimates and those of other parties, does not constitute an abuse of discretion nor arbitrary or capricious action.

D. *Conclusion*

In sum, we affirm the Governors' order which accepts the PRC recommendation to reject the CRM proposal. However, we, like the Governors, do not rest our decision on the PRC classification conclusion. Rather, we agree with the Governors and the PRC that the wide range of uncertainties in the record surrounding the CRM proposal rendered rational and informed application of the ratemaking provision [51] a near impossibility.

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[49] *See id.* at 36-37.

[50] *See id.* at 43-45.

[51] 39 U.S.C. § 3622(b).

However, we emphasize that our decision is strictly limited to the CRM proposal and the record in this ratemaking proceeding. Our affirmation of the PRC's rejection of this CRM proposal does not imply that future CRM proposals, supported by a fuller, more substantial record, should be rejected. By contrast, we echo Chairman DuPont's encouragement to the Postal Service to restudy the CRM concept and offer a new proposal in future proceedings.[52]

II. Prior Years' Losses

We now turn to the question whether the Postal Service may include a provision for the recovery of prior years' operating losses in its revenue requirement under 39 U.S.C. § 3621 (1976).[53] The PRC[54] and the Governors[55] first approved this practice in the 1976 ratemaking proceeding (docket no. R76-1), review of which was dismissed as moot.[56] The PRC's and Governors' decisions in the proceedings now under review approved the recovery of this item in the revenue requirement, relying almost entirely on their 1976 decisions. We

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[52] *See* concurring opinion of Chairman DuPont at 11.

[53] Petitioners Time Inc., Magazine Publishers Association, Inc., and intervenors Association of American Publishers, Inc. and the Recording Industry Association of America, Inc. lead the challenge against the inclusion of prior years' losses in the revenue requirement. We shall simply refer to these parties as petitioners.

[54] Opinion and Recommended Decision of June 30, 1976, Docket No. R76-1 (No. R76-1 PRC Op.).

[55] Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services (July 7, 1976) (No. R76-1 Governors' Decision).

[56] National Association of Greeting Card Publishers v. USPS, No. 76-1611 (dismissed as moot in Memorandum Opinion and Order of June 27, 1978).

hold that the language of 39 U.S.C. § 3621 and the legislative intent underlying the Act [57] allow the Postal Service, in the exercise of its sound economic judgment, to recover these accumulated operating deficits through the revenue requirement in these proceedings.

A. *39 U.S.C. § 3621*

The fiscally sound operation of any organization rests upon the maintenance of a balance between costs and income. The statutory mandate of 39 U.S.C. § 3621, which applies this economic principle to the Postal Service, provides in part:

> Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

Pursuant to this "break-even" standard, the Postal Service must set its postal rates and fees at a level which ensures that costs are met by income from rates and fees and by appropriations. The Postal Service's "revenue requirement," which represents the overall amount of income which must be collected from rates and fees, thus forms the basis for determining appropriate rates for postal services.

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[57] *See* note 3 *supra*.

B. *Scope of Review*

The PRC decision before us states "that the requested provision for recovery of prior year losses is reasonable and in accord with precedent established in Docket No. R76-1." [58] Due to the relatively cursory treatment of this issue in the PRC decision now under review, we have looked to the PRC decision in docket no. R76-1 for the explanation of this item and the rationale supporting its inclusion in the revenue requirement.[59] Our scope of review is limited to whether a fair reading of section 3621 and the legislative intent of the Act provide authority for the Postal Service's election to recoup prior years' losses through the revenue requirement, rather than through borrowing or appropriations.

C. *Computation of Prior Years' Losses*

Operating deficits have plagued the Postal Service for decades.[60] The Act was passed to solve this problem, but unfortunately the Act's goals have failed to reach fruition. The Postal Service has continued to incur operating losses.[61] It has attempted to offset these losses by

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[58] PRC Op. at 43.

[59] Judicial examination of the decision in docket no. R76-1 is permissible under Functional Music, Inc. v. FCC, 274 F.2d 543, 546-47 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), in which this court examined prior agency action on which the validity of the later agency action under review depended. *See, e.g.*, Network Project v. FCC, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975).

[60] In 1970, when the Act was passed, Congress noted: "The Post Office chronically operates at a huge deficit, expected to exceed $1.4 billion in the current fiscal year." H. R. REP. No. 1104, 91st Cong., 2d Sess. 5 (1970).

[61] *See also* 122 CONG. REC. S14418 (daily ed. Aug. 24, 1976) (remarks of Sen. McGee) ("One of the burdens of this new postal system was that they had to address themselves to an accumulated problem over the past 20 years or so all in one year or 2 years, or try to.").

drawing down working capital,[62] incurring debt,[63] reducing services, and increasing rates.[64] The Postal Service has also turned to Congress seeking appropriations. *See* Postal Reorganization Act Amendments of 1976 (1976 Amendments).[65]

In the proceeding now under review, the Postal Service computed the total amount of unrecovered prior years' losses at $2.336 billion,[66] which is the excess of

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[62] In No. R76-1 PRC Op. at 45-46, the PRC stated that "[n]et working capital (i.e., an excess of current assets over current liabilities) is a necessity for the continued operation of a business, and from the accounting standpoint such net working capital would be considered a part of equity."

[63] By 1976, the Postal Service had deepened its insolvency through annual resort to off-budget borrowing for operating expenses. The Postal Service had been unable to meet the schedule for repayment of operating debt and had been forced to "roll-over" debt obligations as they became due. *See* S. REP. No. 966, 94th Cong., 2d Sess. 3 (1976). *See* note 69 *infra*.

[64] Congress has noted the ineffectiveness of prolonged rate-making proceedings:

> The most recently completed rate case . . . took 2 years from start to finish, during which time the inexorable increase in the cost of doing business outpaced revenues. Had the case been decided 6 months earlier, . . . the Service's fiscal year 1976 operating deficit likely would have been wiped out and a small surplus might have been realized.

S. REP. No. 966, 94th Cong., 2d Sess. at 7.

[65] Postal Reorganization Act Amendments of 1976 (1976 Amendments), Pub. L. No. 94-421, 90 Stat. 1303 (codified throughout 39 U.S.C. §§ 101-5605 (1976)). *See* note 67 *infra*.

[66] The PRC considered the following table (footnotes omitted):

net operating losses and deficits from 1971 to 1978 over the $1 billion subsidy appropriated by Congress in the 1976 Amendments.[67] The PRC proposes to recover the $2.336 billion over a seven year period, from 1978 to 1985, thus yielding an annual recovery of $334 million.[68] It is the inclusion of this $334 million in the revenue requirement as recovery of prior years' losses which petitioners challenge.

Although the PRC decision under review fails to provide us with a detailed breakdown of the composition of the $334 million, it is apparent that these losses have a hybrid nature: (1) a portion of the prior years' losses

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PRIOR YEAR LOSSES

	(Millions)
Net Operating Losses July 1, 1971 through September 30, 1976	$2,776
Estimated Deficit in FY 77	203
Estimated Deficit October 1, 1977 to March 24, 1978	357
Less: Subsidy pursuant to Pub. L. No. 94-421	1,000
Total Recovery Over 7-Year Period (1978-1985)	$2,336

PRC Op. at 43.

[67] 1976 Amendments, Pub. L. No. 94-421, § 2(b), 90 Stat. 1303 (codified at 39 U.S.C. § 2401(d) (1976)). Spurred by the problems of reduction in service, increasing postal rates, and a continuing operating indebtedness which the Postal Service faced, Congress enacted these amendments which: (1) authorized two appropriations in the amount of $500 million each to be applied against the accumulated operating indebtedness of the Postal Service; (2) prohibited certain service cuts during the subsidy period; and (3) allowed no postal rate increase during that same period. *See* S. REP. No. 966, 94th Cong., 2d Sess. (1976).

[68] *See* No. R76-1 PRC Op. at 42-44 for a discussion of the reasonableness of the Postal Service's proposal of a seven year amortization period.

are represented by operating debt; (2) the remaining segment is not represented by debt obligations, but was incurred by drawing down working capital.[69]

D. *Recovery of Losses Represented by Debt*

Under 39 U.S.C. § 2005(a) (1976),[70] the Postal Service is authorized to borrow money to meet operating expenses and to issue obligations therefor. "The Postal Service may . . . pledge and use its revenues and receipts for the payment of the principal of or interest on such obligations." 39 U.S.C. § 2005(b) (1976). The resultant debt obligations, according to the PRC, are includible in the revenue requirements under section 3621, as "debt

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[69] *See* PRC Op. at 44. In docket no. R76-1, the past operating losses sought to be recovered were $1.454 billion, in seven annual installments of $207.8 million. These losses had been incurred in fiscal year 1972 to fiscal year 1975. Over two-thirds of the $1.454 billion was represented by debt, in the form of two promissory notes of $500 million each, held by the Federal Financing Bank and executed by the Postal Service, to finance operating expenses in the fiscal years 1975 and 1976. *See id.* at 31 n.3.

The principal scheduled to be repaid on the two promissory notes executed to cover 1975-1976 operating expenses amounted to $200 million annually for the five fiscal years 1976 through 1980. *See* No. R76-1 PRC App. A at 2. Assuming that $600 million in principal remains to be repaid from fiscal year 1978 to fiscal year 1980, one may conclude that at least $600 million, or approximately one-fourth, of the $2.336 billion in prior years' losses sought to be recovered in this ratemaking proceeding, is represented by debt obligations.

[70] 39 U.S.C. § 2005(a) (1976) provides, in part:

> The Postal Service is authorized to borrow money and to issue and sell such obligations as it determines necessary to carry out the purposes of this title. . . . In any one fiscal year . . . the net increase in the amount of obligations outstanding issued for the purpose of defraying operating expenses of the Postal Service shall not exceed $500,000,000.

service (including . . . provision for sinking funds or other *retirements of obligations* to the extent that such provision exceeds applicable depreciation charges)...." [71]

Petitioners assert that the term "total estimated costs," as used in section 3621, limits costs that may be included in the revenue requirement to those that will be incurred in a future period. They also contend that the phrase, "to the extent that such provision exceeds applicable depreciation charges," limits debt service that may be included in the revenue requirement to those debts incurred for capital purposes. They conclude that debt incurred for operating expense, which is nondepreciable, is thus nonincludible in the revenue requirement under section 3621.

The PRC decision in docket no. R76-1, upon which the PRC and the Governors relied in this case, considered sections 2005 and 3621 together and interpreted section 3621 as permitting recovery of an amount for payment of obligations issued pursuant to section 2005.[72] The PRC decision also rejected the "capital debt" argument that petitioners advance in this court. The PRC explained that the limitation on recovery of debts "to the extent that such provision exceeds applicable depreciation charges" merely prevents double recovery in the revenue requirement, once through depreciation charges and again through charges for debt service.[73]

We find that the plain language of section 3621 clearly supports the recovery, through the revenue requirement, of prior years' losses represented by debt. A commonsense reading of the statute refutes the restriction of "estimated costs" to costs that are incurred in the fu-

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[71] 39 U.S.C. § 3621 (1976) (emphasis added).

[72] No. R76-1 PRC Op. at 27.

[73] *Id.* at 32-33; *see* text at 73 *supra*.

ture.[74] The statutory language permitting recovery of an amount for "retirement of debt obligations" clearly denotes recovery for costs (debt obligations) incurred in prior years.[75]

We also conclude that the language of section 3621 does not support a narrow reading of "debt service" that would restrict it to debt incurred for capital expenses. Congress specifically provided that the Postal Service could incur debt both for capital improvements and for operating expenses. It differentiated between the two outlays in section 2005(a) solely for the purpose of setting a debt ceiling in connection with operating expenses. Congress declined to distinguish between the capital or noncapital purposes for which debt had been incurred when it provided for the inclusion of debt service in the revenue requirement under section 3621. The fact that depreciation charges must be deducted when including a provision for capital debt in the revenue requirement does not mean that a provision for noncapital debt cannot be included in the revenue requirement at all.

As a broad challenge to the recovery of prior years' losses, whether *vel non* represented by debt, petitioners also cite the conventional public utility rule which eschews

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[74] We heed the same reminder that cautioned the court in *NAGCP I*:

> We are reminded on numerous occasions that "'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, 45 S.Ct. 274, 276, 69 L.Ed. 660 (1925), *quoted in Chandler v. Roudebush*, 425 U.S. 840, 847, 96 S.Ct. 1949, 1953, 48 L.Ed.2d 416 (1976).

569 F.2d at 596 n.113.

[75] *See* 39 U.S.C. § 2005(b) (1976).

recovery of past losses in current rates. *Galveston Electric Co. v. Galveston*, 258 U.S. 388, 393 (1922). Recognizing that its interpretation may represent a departure from this conventional rule of regulatory practice, the PRC questioned the rule's applicability to a nonprofit organization, such as the Postal Service, which operates on a statutory break-even standard and may not recoup prior years' losses through later profits.[76]

We do not find that the recovery of prior years' losses is barred by a public utility rule barring recovery of prior losses in current rates. *See Galveston Electric Co. v. Galveston*, 258 U.S. at 393; *Communications Satellite Corp. v. FCC*, No. 75-2193, slip op. at 22 n.19 (D.C. Cir. Oct. 14, 1977). Even if the Postal Service were treated as a conventional utility, the rule might be inapplicable in view of the restrictive circumstances surrounding the Postal Service's financial decline.[77] In any event, it would be incongruous for us to clamp the shackles of a narrow rule onto the Postmaster General's attempt to return the Postal Service to financial stability, especially in light of the congressional intent to provide the Postal Service with the "unfettered authority and freedom it has been denied for years to maintain and operate an efficient service."[78] Therefore, section 3621 statutorily authorizes the recovery of prior years' operating losses represented by debt through inclusion in the revenue requirement.

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[76] PRC Op. at 45 (citing No. R76-1 PRC Op. at 25-30).

[77] *See* Communications Satellite Corp. v. FCC, No. 75-2193, slip op. at 22 n.19 (D.C. Cir. Oct. 14, 1977) (where a history of agency strictures have prevented a reasonable rate of return, a company might be entitled to recover its losses).

[78] S. REP. No. 912, 91st Cong., 2d Sess. 2 (1970).

E. *Recovery of Losses Not Represented by Debt Obligations*

The issue whether the Postal Service is authorized to recover prior years' losses not represented by debt obligations through inclusion in the revenue requirement is not as easily decided. The PRC relied primarily on congressional intent and the policy of the Act to justify inclusion of these losses under section 3621. The PRC pointed out that one of the major policy determinations of the Act was to give postal management the flexibility to operate an efficient and economical postal system.[79] It would be inconsistent with this policy, the PRC reasoned, to limit recovery of losses only to those represented by debt, because this would compel the Postal Service to borrow, and thereby incur attendant interest expense, when the cash needs of the Postal Service would permit drawing down existing funds.[80] The PRC concluded that " 'the general principles of postal self-sufficiency which underlie the Postal Reorganization Act contemplate the recovery of prior year losses through rates and fees,' to an extent not limited to those losses represented by debt." [81]

The Postal Service points out in this court that Congress, in directing that " 'total estimated costs' shall *include* (*without limitation*) operating expenses, depreciation . . ., debt service . . ., and a reasonable provision

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[79] *See, e.g., id.;* H. R. REP. No. 1104, 91st Cong., 2d Sess. 2, 5 (1970).

[80] PRC Op. at 44; *see* No. R76-1 PRC Op. at 39.

[81] PRC Op. at 44 (quoting No. R76-1 PRC Op. at 40). *See also* Direct Mail Advertising Ass'n v. USPS, 458 F.2d 813, 814 (D.C. Cir.), *cert. denied,* 409 U.S. 843 (1972) ("one of [the Act's] principal goals was that eventually the postal service would become self-sufficient: be able to operate on the revenue received from postal rates and fees without the assistance of congressional appropriations.").

for contingencies," [82] clearly created a non-exclusive list of costs to be included in the revenue requirement. The Postal Service also asserts that principles of statutory interpretation accord weight to the PRC's application of a broad statutory term [83] and that the PRC's decision was within the range of permissible choices contemplated by statute.[84] The Postal Service contends that congressional intent justifies the inclusion in the revenue requirement of losses not represented by debt because these prior years' losses were incurred as an alternative to borrowing, and allowing their inclusion in the revenue requirement would serve a purpose similar to the provision for retirement of debt obligations.

In opposition, petitioners maintain that only an "open-ended, virtually unlimited construction" of the "without limitation" language in section 3621 would justify the inclusion in the revenue requirement of prior years' losses not represented by debt.[85] Finally, opposing parties make the economic policy arguments that blanket recovery of prior years' losses through rates is a strong disincentive to the efficient and economical management mandated by the Act, and that inclusion of prior years' losses will permit rates to be set at levels resulting in a statutorily impermissible profit.

Upon consideration of the parties' numerous arguments, and after examination of the legislative history of the Act, we hold that the Postal Service's election in

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[82] 39 U.S.C. § 3621 (emphasis added).

[83] Brief for Appellee at 48 (citing NLRB v. Hearst Publications, 322 U.S. 111, 131 (1944)).

[84] *Id.* at 49 (citing Hardin v. Kentucky Utilities Co., 390 U.S. 1, 8 (1968)).

[85] Brief for Intervenors Association of American Publishers, Inc. and Recording Industry Association of America, Inc. (Brief for Intervenors) at 5.

these proceedings to recover prior years' losses not represented by debt through inclusion in the revenue requirement under section 3621 comports with the legislative intent of the Act and is statutorily permissible. Although losses not represented by debt are not explicitly enumerated as includible in the revenue requirement under section 3621, we do not find this to be a bar. The plain language of the statute provides that " 'total estimated costs' shall *include (without limitation)*" [86] the enumerated items. We are hard-pressed to envision language less restrictive than this.[87]

This is not to say, however, that the term "total estimated costs" is so broad as to be without meaning, or that the phrase "without limitation" grants the Postal Service *carte blanche* to include any amount as costs in the revenue requirement. The question whether a particular cost is includible "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). Its determination "is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute." *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 8 (1968).

In specifying items as "costs" within the meaning of section 3621, the "range of permissible choices contemplated by the statute" includes costs which are demonstrably related to those specifically enumerated in section 3621. The prior years' losses in question are demonstrably related to operating expenses, which are enumerated in section 3621, because they were incurred to pay for

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[86] 39 U.S.C. § 3621 (emphasis added).

[87] As the House Committee on Post Office and Civil Service explained in its sectional analysis of the Act, "[t]he term 'costs' is taken in its broad economic sense . . . ." H. R. REP. No. 1104, 91st Cong., 2d Sess. 40 (1970).

operating expenses. Moreover, prior years' losses not represented by debt are of the same character as those losses represented by debt, which the plain language of the statute clearly authorizes,[88] because the former were incurred as an alternative to the latter. To hold that the recovery of the losses in question is barred because they are not represented by formal debt would be unduly formalistic and in contravention of the specific statutory purpose of maintaining a financially stable enterprise that operates on a "break-even" basis.

Consideration of the legislative history of the Act convinces us that the Postal Service's determination has "reasonable support in relation to the statutory purpose." *Hardin v. Kentucky Utilities Co.*, 390 U.S. at 9. In enacting the legislation in question, Congress responded to the severe and imminently catastrophic financial crisis with which this nation's postal system was faced.[89] Prior to the Act, the postal system was caught in a seemingly hopeless situation of chronic debt and disorganization. Its descent into bankruptcy and financial chaos appeared inevitable, and the then restrictive laws and archaic postal organization made relief unlikely.[90]

Congress then moved affirmatively to rescue the system from impending disaster. It reorganized the postal system and created an independent United States Postal Service. Recognizing this country's need for a viable system of communication by mail, and acknowledging the cumbersome shackles of existing postal regulation, Congress approved the new statutory scheme to meet "the obvious requirement that postal management . . . be

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[88] *See* our discussion at 78-79 *supra*.

[89] The postal work stoppage in March 1970, was symptomatic of the widespread breakdown in postal service. *See* H. R. REP. No. 1104, 91st Cong., 2d Sess. 3 (1970).

[90] S. REP. No. 912, 91st Cong., 2d Sess. 2 (1970).

given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service." [91] This freedom included giving the Postal Service control over costs as well as the tools with which to exercise that control.[92] The tools include the power to borrow,[93] to raise revenues from ratemaking,[94] and to

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[91] *Id.*

[92] Representative Udall, as one of the sponsors of the bill that became the Act, stated that

> the principal problem facing the Post Office Department was one of no control. There is now no real control over the costs incurred by the Department, . . . and there is little control over the price charged for the services rendered. A major goal of the conferees was to establish in postal management the requisite tools to accomplish these aims.

116 CONG. REC. 27604 (1970) (remarks of Rep. Udall).

[93] Statutory authority for borrowing rests in 39 U.S.C. § 2005 (1976), which permits the Postal Service to borrow money either from the Secretary of the Treasury or upon the open market in an amount not to exceed $10 billion outstanding in obligations at any one time. The Senate Committee on Post Office and Civil Service cautioned the Postal Service "that if borrowed money is used to meet current operating expenses, lenders will charge a very high premium. Thus, the use of bond revenue for operating expenses should be restricted to the most unusual circumstances." S. REP. NO. 912, 91st Cong., 2d Sess. 9 (1970). The committee further expressed its hope, and caveat, that the Postal Service would "give the highest consideration to the public interest in the entire matter of selling bonds and using bond revenue." *Id.* at 9-10.

[94] Authority to fix rates and classes rests in the Postal Service pursuant to 39 U.S.C. § 3621. Discussion of the possibility of an accumulated operating deficit arose in 1970, before the Act was passed. In response to the unfortunately prophetic concern voiced by Representative Pucinski regarding how the Postal Service would finance its mounting deficits, Representative Dulski, one of the bill's sponsors, answered: "You will find in this bill provision for the necessary

seek appropriations.[95]

When continually mounting deficits and the sluggish movement of ratemaking proceedings[96] prompted the Postal Service to seek relief from its losses through appropriations in 1976, the congressional spirit of optimism and revitalization which had accompanied the 1970 Act was tempered with the realization that the Postal Service's struggle with operating deficits would continue.[97]

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financing—including a *new system of rate-setting* and authority to borrow up to $10 billion." 116 CONG. REC. 20204 (1970) (remarks of Rep. Dulski) (emphasis added).

[95] The Postal Service was entitled to transitional appropriations under 39 U.S.C. § 2004 (1970) (amended 1976) and is entitled to seek appropriations under 39 U.S.C. § 2401 (1976). However, in enacting the Act, Congress viewed appropriations with a skeptical eye:

> The mandate that the Postal Service must be self-supporting is essential if postal affairs are to be conducted with reasonable economy and efficiency. So long as postal management operates with a general awareness that congressional appropriations are always available, with some uncertin limit, to make good any shortfalls of revenue or overruns of costs, there is little real incentive to make the best possible use of resources . . . . Moreover, the "break-even" requirement of [the Act] represents a commitment that the Postal Service no longer rely on massive annual infusions of general revenues of the Treasury at the taxpayers' expense.

H. R. REP. No. 1104, 91st Cong., 2d Sess. 17 (1970). Representative Udall reiterated the congressional reluctance towards appropriations: "It was my intent, in approving [transitional appropriations], that the Postal Service ultimately stop coming to Congress for annual appropriations and create a self-sufficient enterprise." 116 CONG. REC. 27606 (1970) (remarks of Rep. Udall).

[96] *See* note 64 *supra.*

[97] We recognize that legislative events subsequent to the Act "form a hazardous basis for inferring the intent of an earlier [Congress]." United States v. Price, 361 U.S. 304, 313 (1960), *quoted in* United States v. Philadelphia National

To alleviate part of this pressure, Congress enacted the 1976 Amendments,[98] thereby appropriating $1 billion to be applied to the operating losses for 1976 and 1977. Congress left intact the remaining amount of loss, recovery of which the Postal Service has determined essential to achieve the goal of a financially stable enterprise.[99]

The Postal Service has selected, as its method of financing in this ratemaking proceeding, the inclusion of these losses in the revenue requirement. We do not find its choice an impermissible one in this proceeding, nor do we find it inconsistent with the "central purpose of the [Act] to place the Postal Service on a self-sufficient basis." *Direct Mail Advertising Association v. USPS*, 458 F.2d 813, 819 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 843 (1972). Upon consideration of the legislative history of the Act, we agree that recovery of prior losses not represented by debt in this proceeding has reasonable support in relation to the statutory purpose. *See Hardin v. Kentucky Utilities Co.*, 390 U.S. at 9.

We find the broad economic policy arguments raised by those challenging the recovery of prior years' losses

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Bank, 374 U.S. 321, 349 (1963). However, subsequent legislative events directly pursuant to the Act, are not wholly irrelevant. Therefore, we briefly consider the legislative developments in 1976, which are now embodied in the Act, for a fuller historical view of the economic condition of the Postal Service.

[98] *See* note 65 *supra*.

[99] *See* No. R76-1 PRC Op. at 40-51. In this case, the PRC reiterated that recovery of prior years' losses serves a two-fold purpose: (1) to ensure financial stability, and (2) to fulfill the statutory "break-even" requirement. PRC Op. at 47. In practical terms, the PRC pointed out that even with the recovery of $334 million in operating losses, the net deficit in equity will be $611 million, approximately $23 million more than that which existed as of September 30, 1977. *Id.* at 48.

unpersuasive. The various economic strategems and their effects are matters entrusted to the wise discretion and expertise of the Postal Service.[100] We will not substitute our judgment concerning the economic wisdom of its decision to recoup these past operating losses through section 3621, because its decision is consistent with the statutory purposes of the Act—the Postal Service should be financially self-sufficient [101] and should "break even." [102]

The recovery of past losses in the revenue requirement is not to be construed as a mechanism for the approval of costs imprudently incurred.[103] In its recovery of prior years' losses in general, the Postal Service must comply not only with the statutory policy of financial self-sufficiency, but also with the congressional mandate of honesty, efficiency, and economical management.[104] In the context of these ratemaking proceedings, we find that the language and purpose of the Act support the Postal Service's, the PRC's, and the Governors' decisions to allow the recovery of the past operating expenses not represented by debt through inclusion in the revenue requirement under section 3621.

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[100] The Postal Service's annual budget is subject to the scrutiny of the Office of Management and Budget. 39 U.S.C. § 2009 (1976).

[101] Direct Mail Advertising Ass'n v. USPS, 458 F.2d at 814, 817.

[102] 39 U.S.C. § 3621; *see* text at 73 *supra*.

[103] No. R76-1 PRC Op. at 35 n.1. "If a party shows that an expense was imprudently or improperly incurred, the disallowance otherwise proper should not be defeated by the circumstance that the Treasury would in any event have to be repaid." *Id.*

[104] For example, when considering borrowing, the postal service must also heed the reiterated congressional concern that "annual resort to offbudget borrowing for operating expenses can only deepen the Service's insolvency." S. REP. No. 966, 94th Cong., 2d Sess. 3 (1976). *See* note 95 *supra*.

III. Fourth-Class Parcel Post Mail Rates

A final challenge to the PRC's and Governors' decisions focuses on whether the PRC's imposition of "constraints" on fourth-class parcel post rates found to be cost-justified is arbitrary and in violation of 39 U.S.C. § 3622(b) (1976).[105] We affirm the constrained rate schedule for parcel post in this ratemaking proceeding, because the constraints temper the possibly deleterious impact of restructured parcel post rates and advance the statutory goals of the Act. We rely on the PRC's assurance that this interim path of moderation, which is the product of considering the best available evidence in light of § 3622 (b), is not a dead-end but will inevitably lead to a finer tuned compliance with the statutory mandates for rate-making.[106]

A. *Background*

Parcel post rates have traditionally rested on weight and distance factors. Eight distance-based categories and sixty-nine weight categories [107] intersect to form a matrix of 552 zones for computing parcel post rates. Within each zone, the rate is based on a discrete per piece and per pound charge. In the past, parcel post rate increases have consisted of across-the-board escalations for all of the 552 weight-distance rate cells.

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[105] *See* companion opinion at 14-15 n.13 for full text of 39 U.S.C. § 3622(b).

[106] *See* PRC App. M at 15. We rely on the fact that the parcel post rate structure allowed by our decision will not remain static. *See* Governors' Rate Decision at 6 (directing the postal management to prepare a proposed request to the PRC for a recommended decision to restructure parcel post rates).

[107] The weight categories are segmented into one pound increments ranging from two pounds to 70 pounds.

In an attempt to comply with *NAGCP I*, the Postal Service proposed a new methodology of rate design, which would recover all transportation costs for parcel post through the per pound charge and all remaining costs through the per piece charge.[108] One of the basic assumptions underlying this proposal is that all costs, with the exception of transportation costs,[109] are insensitive to changes in weight up to thirty pounds, and again from thirty pounds to the seventy pound limit.[110]

The PRC was not convinced that the Postal Service's rate design had been verified by empirical methods. It was concerned, moreover, that the drastic rate increases and decreases that would be caused by the proposal would have a harmful effect on users, competitors and the Postal Service. The PRC thus undertook an independent analysis of the rate design.[111]

The PRC's analysis revealed that insufficient evidence supported the proposal's premise that non-transportation costs were insensitive to weight[112] and that the Postal Service incorrectly applied the proposed rate component for transportation costs.[113] The PRC therefore proposed

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[108] The PRC determined that an overall rate increase of more than 35% over existing parcel post rates was necessary.

[109] Non-transportation costs include acceptance, processing, and delivery costs. PRC App. M at 1.

[110] *Id.* The Postal Service proposed to double the per piece charge for parcels over 30 pounds.

[111] *Id.* at 1-16, contains this analysis.

[112] *Id.* at 2. The PRC thus encouraged the Postal Service and other parties "to develop in future proceedings, a more thorough analysis of the relationship between parcel transportation and all other parcel costs with weight and/or cubic feet, distance, and any other cost-causative factors." *Id.* at 2-3.

[113] *Id.* at 10. None of the parties dispute this conclusion. In announcing its conclusion, the PRC stated it hoped the

a modified cost-based rate design based on data from the record.[114] The rates that resulted from the PRC's cost-based development would have effectuated dramatic increases and decreases in the current rates in many rate cells. To diminish the potentially deleterious effects of such drastic changes, the PRC placed the following restrictions on its recommended rates: (1) increases in each rate cell are not to exceed fifty percent of the former rate; and (2) no rate cell may decrease to a rate lower than the old rate.[115] The PRC expressed its hope that the constrained rates would "move [the PRC] and the Postal Service in the direction of more closely cost-based rates."[116] For the interim period, the PRC believed that its constrained rates would more closely reflect costs than the old rates, without creating radical market disturbances.

B. *Arguments Regarding the PRC's and Governors' Decisions*

Petitioners Growers and Shippers League of Florida and Florida Gift Fruit Shippers Association (Fruit

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Postal Service and parties would develop a methodology to better describe the nature of transportation cost incurrence. *Id.*

[114] The PRC proposed rates that reflected a "narrowing of the impact of weight upon non-transportation costs by reducing the current structure's four-cents-per-pound weight increment to three-cents-per-pound weight increment." *Id.* at 12. The PRC also increased the non-transportation costs between the 30th and 31st pound increment by an additional 45 cents over and above the normal three-cents-per-pound progression. *Id.* at 13.

[115] *Id.* at 14-15.

[116] *Id.* at 15. The Governors approved the PRC recommendation and directed that postal management prepare a request to the PRC for a recommended decision to restructure parcel post rates. Governors' Rate Decision at 6.

Shippers) argue that the PRC should have adopted a cost-based rate schedule without constraints.[117] They assert that the imposition of arbitrary constraints, which preclude a decrease below former rates, disregards 39 U.S.C. § 3622(b)(3) and is therefore not "fair and equitable," in violation of 39 U.S.C. § 3622(b)(1). Moreover, they allege that using the old rates as a reference point for the constraints is fatal error, because those former rates are unsupported by the evidence and are not tied to cost incurrence. According to the Fruit Shippers, the arbitrary constraints coerce intraclass subsidization, in direct contravention of the mandates of *NAGCP I.*

United Parcel Service of America, Inc. (UPS) intervened to oppose the Fruit Shippers' attack on the PRC's and Governors' decisions.[118] UPS argues that the imposition of constraints is essential to mitigate the potentially deleterious impact of the recommended rate structure, impacts which have not been sufficiently studied and which may result in a radical tilting of the entire parcel post rate structure to the detriment of users, competitors and the Postal Service alike. Furthermore, UPS argues, the focusing of the constraints on former rates is not unreasonable or arbitrary when one considers the cost-basis underlying the old rates.

C. *Determination of the Court*

We agree with the Fruit Shippers that the PRC's recommended rates, without constraints, were formulated in the spirit of *NAGCP I* and section 3622(b)(3) and, therefore, are an improvement over the former rates.

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[117] Brief for Appellants Growers and Shippers League of Florida and Florida Gift Fruit Shippers Association (Brief for Fruit Shippers) at 12-16.

[118] The Postal Service presents a one-page defense of the PRC's and Governors' decisions. Brief for Appelleee at 46.

However, sections 3622(b)(4) and (b)(5)[119] require the PRC to consider the effect of rates on the public and competitors.[120] It is clear that insufficient empirical data existed, at the time of the PRC's decision, to assess the impact that the new cost-based rates would have on the public and Postal Service competitors.[121] *NAGCP I* and section 3622(b)(3) do not require myoptic and exclusive adherence to principles of cost-justification, while recklessly ignoring the impact of rates on the other factors enumerated in section 3622(b). The constraints proposed by the PRC are not arbitrary. They are based on former rates which historically have been more tied to cost incurrence than other rates[122] and the impacts of which are known.

We conclude that the interim imposition of constraints, until data is available to assess the impact of cost-based

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[119] *See* companion opinion at 14 n.13.

[120] 39 U.S.C. § 403(a) (1976) also mandates that "the Postal Service shall receive, transmit, and deliver . . . parcels, and like materials . . . ." To allow the PRC to ignore the possibly detrimental effect of a new parcel post rate structure on the Postal Service's ability to comply with this statutory mandate, would be in contravention of the intent expressed in § 403(a).

[121] The PRC was concerned about the impact on the market for parcel post that its "ideal rate structure" would cause. PRC App. M. at 15-16. The Governors' Decision shared this concern over the unknown impact of the recommended parcel post rates. Governors' Rate Decision at 5.

[122] Before the Act was passed, parcel post and first-class mail were the only classes with rates which were required to be cost-based. *NAGCP I*, 569 F.2d at 588 n.63 (quoting S. REP. No. 912, 91st Cong., 2d Sess. 10 (1970)). Immediately prior to the Act, the law required that the revenues from parcel post be neither greater nor less than its cost by more than four percent. Act of September 20, 1966, Pub. L. No. 89-593, 80 Stat. 815, 817 (formerly 39 U.S.C. § 4559 (Supp. III 1965-1967)).

rates, is a reasonable compromise at this time. In affirming the PRC's and Governors' decisions, we not only hope, but fully expect, "that the current rates will move [the PRC] and the Postal Service in the direction of more closely cost-based rates." [123]

Affirmed

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[123] PRC App. M at 15.

APPENDIX B

Decisions of the Governors of the Postal Service

(1) On Rates of Postage and Fees for Postal Services

and

(2) On Changes in the Domestic Mail Classification Schedule Re Citizens' Rate Mail

May 19, 1978

ACTION OF THE GOVERNORS UNDER 39 U.S.C., SECTION 3625, AND SUPPORTING RECORD IN THE MATTER OF CHANGES IN RATES OF POSTAGE AND FEES DOCKET R77-1 BEFORE THE POSTAL RATE COMMISSION AND CHANGES IN THE DOMESTIC MAIL CLASSIFICATION SCHEDULE RE CITIZENS' RATE MAIL

VOLUME I

DECISIONS OF THE GOVERNORS

The material herein is printed pursuant to section 3625(e) of title 39, United States Code, which was enacted into law by section 2 of the Postal Reorganization Act (P. L. 91-375, August 12, 1970, 84 Stat. 719). Section 3625(e) provided in pertinent part:

> The decision [of the Governors of the Postal Service], the record of the [Postal Rate] Commission's hearings, and the Commission's recommended decision shall be made available at the time the [Governors'] decision is issued and shall be printed and made available for sale by the Public Printer within 10 days following the day the decision is issued.

This material is in four volumes. Volume I contains the Commission's recommended decision and the decisions of the Governors of the Postal Service. Volume II contains the official transcript of proceedings before the Commission. Volume IV contains the exhibits. All four volumes are on microfiche. The Governors' decisions, starting on page 1-01042, regarding changes in postage rates and fees, and starting on page 1-01098, regarding changes in the classification schedule, are also printed.

With the exception of the decisions of the Governors all of the documents have been certified by the Secretary of the Commission to be true and correct copies of documents on file with the Commission.

DECISION OF THE GOVERNORS OF THE UNITED STATES POSTAL SERVICE ON RATES OF POSTAGE AND FEES FOR POSTAL SERVICES

May 19, 1978

Pursuant to the provisions of the Postal Reorganization Act, the Governors of the United States Postal Service hereby approve the Postal Rate Commission's Recommended Decision on Changes in Rates of Postage and Fees for Postal Services, transmitted to the Governors on May 12, 1978 (Commission Docket No. R77-1). We take this action after having considered the range of options available to us, to the conclusion that the circumstances that attend our deliberations require that we accept the recommended decision.

The Postal Service's Board of Governors has concurrently determined that the schedules of rates and fees set forth in Appendices I and II hereto, which are the schedules recommended by the Commission in its Recommended Decision of May 12, as amended by the Commission's Errata Notice dated May 18, 1978, will become effective at 12:01 A.M. on May 29, 1978.

In regard to the phasing schedules set forth in Appendix II hereto, this Decision should not be understood as indicating our concurrence in the Commission's view that it has jurisdiction to recommend phased rate schedules under 39 U.S.C. §3626 or to recommend adjustments under 39 U.S.C. §3627 upon its determination that Congress has failed to appropriate amounts authorized under 39 U.S.C. §2401(c). To the contrary, we reaffirm the view that we

have maintained consistently in each of our Decisions on changes in postal rates: the Rate Commission has no jurisdiction over the adoption of phasing schedules under section 3626 or the adjustment of rates to compensate for failures of appropriations under section 3627.

It should be noted that the Commission's Recommended Decision includes not only a recommended set of general rate adjustments, but also a distinct and separate recommendation that the changes which the Postal Service had proposed in the Domestic Mail Classification Schedule with respect to the "Citizens' Rate" proposal should not be approved. We address this discrete recommendation concerning the Mail Classification Schedule in a separate Decision which we are also issuing today.

Statement of Explanation and Justification

This is the fourth ratemaking proceeding under the Postal Reorganization Act. Once again, it has been a massive proceeding in scope, often entailing highly complex technical issues and involving 62 intervenors, the filing of thousands of pages of testimony, extensive cross-examination of witnesses, and the compilation of a record of over 12,500 pages. In this case, as in the previous one, the Commission has completed its task and conducted its proceedings with expedition consistent with procedural fairness to the parties, for which it is to be commended.

Much of what we have said in our Decisions on the three preceding rate cases is applicable to this case as well. Those earlier Decisions are matters of public record, and there is no need to repeat them here. Suffice it to say that we have not altered our views on jurisdictional issues on which we have differed with the Commission (including the question of

jurisdiction over phasing schedules pursuant to 39 U.S.C. §3626). Nor do we alter our previous expressions of approval of the Commission's opinions on such significant matters as the question of recognizing that a reasonable amount for recovery of prior year losses should be included in the revenue requirement.

In referring to our previous expressions of approval of much of the Commission's earlier opinions, we include reference to the Commission's development of costing and pricing principles in the second and third rate cases. To a substantial extent, these principles have been drawn in question by the Decision of the U. S. Court of Appeals in *National Association of Greeting Card Publishers* v. *United States Postal Service,* 569 F.2d 570, (D.C. Cir., 1976). In this connection, we strongly endorse the Commission's views on the bearing of the Court's Decision in *NAGCP I* on this proceeding; we agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

Although we are approving the Recommended Decision, we do so with reservations about certain parts of the Commission's opinion that lead to some of its rate recommendations.

By way of explaining our earlier remarks concerning the circumstances that attend our deliberations, it bears noting that parcel post rates will increase an average of thirty-five percent, at the rates recommended by the Commission. Further, the Commission has recommended a modestly revised rate structure designed more closely to reflect cost incurrence. As to this latter point, the Commission's

achievement is welcome. Our concern centers on the extreme impact that the recommended parcel post rate levels will have on the general public - those individuals and the few business shippers of parcels who, for various reasons, continue to use parcel post. By virtue of 39 U.S.C. 403(a), the Postal Service is directed to "receive, transmit, and deliver throughout the United States . . . parcels and like materials . . . ." The ability of the Postal Service to carry out this mandate, saddled with the price levels recommended by the Commission, is greatly impaired, if not nearly exhausted.

We are aware of the Commission's thoughts regarding the relative inflexibility in devising reasonable rates that attends application of the section 3622(b)(3) factor as interpreted by NAGCP I. But in this instance more can and must be done before we can conclude that the egregious results that follow from placing these rates into effect must be suffered by the general public.

These price levels result from the fact that, with a single stroke, the assignable costs of parcel post were increased by the Commission by substantial portions. The implications of this act include the thought that the typical parcel is far more responsible for the six-day delivery system maintained by the Postal Service than is the typical specimen of any other kind of mail - seven times as responsible as the typical daily newspaper or magazine. Nonetheless for reasons explicit and implicit in the Commission's opinion, we hold no hope for any change in this circumstance were we to return the Commission's Recommended Decision for its reconsideration for further Recommended Decision under 39 U.S.C. 3625(c). Instead, we have directed postal management to prepare for our consideration as members of the Board a proposed request to the Commission for a recommended decision to restructure parcel post rates, and to have that

request before us at our September meeting.

In concluding this statement of explanation and justification, we turn briefly to an issue which has not been raised in any previous postal ratemaking proceeding. One party raised the question of whether an Environmental Impact Statement should be required under the National Environmental Policy Act. After careful consideration of this matter, we agree completely with the Commission that an Environmental Impact Statement is not required. In this connection, we note that Postal Service management has continued to give close attention to the applicability of National Environmental Policy Act requirements to the process of making changes in postal rates, fees, and classifications; that an extensive study on the environmental impact of changes in mail rates and classification, dated May 9, 1978, has resulted; and that this study confirms the conclusion that the effects of such postage changes on the environment are exceedingly speculative and are plainly not sufficiently significant to give rise to any requirement for an Environmental Impact Statement.

Estimate of Anticipated Revenue

The basis of cost and revenue projection in Commission proceedings is a test period that is prescribed by the Commission's Rules of Practice. In this Docket, under Commission rules, the test year was the period beginning March 25, 1978 and ending March 24, 1979. For this period, the Commission estimates that total postal costs would be about $17.585 billion and that revenues would approximate $17.586 billion, assuming that the recommended rates and fees were in effect for the full test year. Although we adopt these figures as reasonable test year calculations, we note that the Service will not be able to

implement new rates until May 29, 1978. Therefore the actual results for the year ending March 24, 1979, will doubtless differ from the Commission's estimates.

ORDER

Pursuant to the foregoing, the rates and fees set forth in Schedule A through G-19[1] of Appendix I, as appended hereto and incorporated herein, are hereby ordered to be placed in effect.

In accordance with 39 U.S.C. §3626, separate rate schedules for the classes of mail and kinds of mailers identified in section 3626 are hereby adopted, as set forth in schedules 1 through 7 of Appendix II as appended hereto and incorporated herein, and the rates becoming effective shall be those set forth in the "Year 6" column under the heading "Phased Rates".

The Postal Service will place the Decision in effect at 12:01 A.M., on May 29, 1978, in accordance with Resolution Nos. 78-3, 78-4, and 78-5, of the Board of Governors, copies of which are attached.

BY THE GOVERNORS:

/s/ M. A. WRIGHT

Chairman

[1]There is no need for us to act on the classification schedule revisions in the Commission's recommended Schedule H, which merely reflect the point that the threshold between first-class mail and priority mail has been reduced from 13 ounces to 12 ounces and the point that the rates recommended by the Commission for regular-rate second-class mail include certain presort subcategories. These points are fully and clearly reflected in the rate schedules recommended by the Commission and here approved by us. In our view, these matters are properly covered in the rate schedules and separate classification action is unnecessary.

RESOLUTION OF THE BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE

Resolution No. 78-3

Effective Date of New Rates of Postage and Fees for Postal Services

RESOLVED:

Pursuant to section 3625(f) of title 39, United States Code, the Board of Governors determines that the rates of postage and fees for postal services that were ordered to be placed into effect by the Decision of the Governors dated May 19, 1978, shall become effective at 12:01 A.M. on May 29, 1978.

The foregoing Resolution was adopted by the Board of Governors on May 19, 1978.

Secretary

RESOLUTION OF THE BOARD OF GOVERNORS
OF THE
UNITED STATES POSTAL SERVICE

Resolution No. 78-4

Effective Date for Changes in the Domestic
Mail Classification Schedule

RESOLVED:

Pursuant to section 3625(f) of title 39, United States Code, the Board of Governors determines that the changes in the Domestic Mail Classification Schedule in regard to elimination of the dual minimum per piece rate structure for third-class bulk regular mail that were ordered to be placed into effect by the Decision of the Governors dated February 7, 1978, shall become effective at 12:01 A.M. on May 29, 1978.

The foregoing Resolution was adopted by the Board of Governors on May 19, 1978.

Secretary

RESOLUTION OF THE BOARD OF GOVERNORS
OF THE
UNITED STATES POSTAL SERVICE

Resolution No. 78-5

Effective Date of New Rates of Postage
and Fees for Postal Services

RESOLVED:

Pursuant to section 3625(f) of title 39, United States Code, the Board of Governors determines that the changes in the Domestic Mail Classification Schedule to simplify the provisions dealing with in-county second-class rates that were ordered to be placed into effect by the Decision of the Governors dated May 2, 1978, shall become effective at 12:01 A.M. on May 29, 1978.

The foregoing Resolution was adopted by the Board of Governors on May 19, 1978.

Secretary

APPENDIX I

APPENDIX I

SCHEDULE A-1
First-Class and Business Reply

Mail Type	Postage Rate Unit	Rate Regular (Cents)	Rate Presorted (Cents) 1/
First-Class:			
Letters	1st Ounce	15	13
	Each add'l ounce	13 2/	13
Cards	Piece	10	9
Business Reply 3/	With advance deposit account	3.5	3.5
	Without advance deposit account	12	12

1/ Presorted first-class mail must be presented in a single mailing of 500 or more pieces properly prepared and presorted. The lower rate applies only to each piece of a group of ten or more pieces destined for the same five-digit ZIP Code or each piece of a group of fifty or more pieces destined for the same three-digit ZIP Code. A mailing fee of $30 must be paid once each calendar year at each office of mailing by or for any person who mails presorted first-class mail.

2/ Rate applies through 12 ounces. Heavier pieces are subject to priority mail rates.

3/ Rates are applied on a per-piece basis in addition to regular postage. A fee of $30 must be paid once each calendar year for each business-reply permit. An accounting charge must be paid once each calendar year for each business-reply advance deposit account.

APPENDIX I

SCHEDULE A-2

Priority Mail

Postage Rate Unit (Pounds)	Rate[1/] (dollars)					
Mail weighing over 12 ozs. and not exceeding	Zones					
	Local 1, 2 & 3	4	5	6	7	8
1	1.71	1.81	1.88	1.97	2.06	2.25
1.5	1.86	1.96	2.07	2.21	2.34	2.50
2	1.99	2.12	2.27	2.44	2.61	2.83
2.5	2.11	2.27	2.46	2.68	2.89	3.16
3	2.23	2.42	2.65	2.91	3.17	3.50
3.5	2.35	2.58	2.84	3.15	3.45	3.83
4	2.47	2.73	3.03	3.38	3.73	4.16
4.5	2.59	2.89	3.22	3.62	4.01	4.50
5	2.72	3.04	3.42	3.85	4.29	4.83
Per Piece	$1.50	$1.50	$1.50	$1.50	$1.50	$1.50
Per Pound	24.3¢	30.8¢	38.3¢	47.0¢	55.7¢	66.6¢

1/ Exception: Parcels weighing less than 15 pounds, measuring over 84 inches but not exceeding 100 inches in length and girth combined, are chargeable with a minimum rate equal to that for a 15-pound parcel for the zone to which addressed.

SCHEDULE A-2a

APPENDIX I

Priority Rate Schedule

WEIGHT NOT EXCEEDING (POUNDS)	LOCAL,1,2,3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8
1.0	1.71	1.81	1.88	1.97	2.06	2.25
1.5	1.86	1.96	2.07	2.21	2.34	2.50
2.0	1.95	2.11	2.27	2.44	2.61	2.82
2.5	2.11	2.27	2.46	2.68	2.89	3.16
3.0	2.23	2.41	2.65	2.91	3.17	3.50
3.5	2.35	2.56	2.84	3.15	3.45	3.83
4.0	2.47	2.71	3.03	3.38	3.73	4.16
4.5	2.59	2.89	3.22	3.62	4.01	4.50
5.0	2.72	3.04	3.42	3.85	4.29	4.83
6.0	2.96	3.35	3.80	4.32	4.84	5.50
7.0	3.20	3.66	4.18	4.79	5.40	6.16
8.0	3.44	3.96	4.56	5.26	5.96	6.83
9.0	3.69	4.27	4.95	5.73	6.51	7.49
10.0	3.93	4.58	5.33	6.20	7.07	8.16
11.0	4.17	4.89	5.71	6.67	7.62	8.83
12.0	4.42	5.20	6.10	7.14	8.18	9.45
13.0	4.66	5.50	6.48	7.61	8.74	10.16
14.0	4.90	5.81	6.86	8.08	9.29	10.82
15.0	5.15	6.12	7.25	8.55	9.86	11.49
16.0	5.39	6.43	7.63	9.02	10.41	12.16
17.0	5.63	6.74	8.01	9.49	10.97	12.82
18.0	5.87	7.04	8.39	9.96	11.53	13.49
19.0	6.12	7.35	8.78	10.43	12.08	14.16
20.0	6.36	7.66	9.16	10.90	12.64	14.82
21.0	6.60	7.97	9.54	11.37	13.20	15.49
22.0	6.85	8.28	9.93	11.84	13.75	16.15
23.0	7.09	8.58	10.31	12.31	14.31	16.82
24.0	7.33	8.89	10.69	12.78	14.87	17.49
25.0	7.58	9.20	11.08	13.25	15.42	18.15
26.0	7.82	9.51	11.46	13.72	15.98	18.82
27.0	8.06	9.82	11.84	14.19	16.54	19.48
28.0	8.30	10.12	12.22	14.66	17.10	20.15
29.0	8.55	10.43	12.61	15.13	17.65	20.81
30.0	8.79	10.74	12.99	15.60	18.21	21.48
31.0	9.03	11.05	13.37	16.07	18.77	22.15
32.0	9.28	11.36	13.76	16.54	19.32	22.81
33.0	9.52	11.66	14.14	17.01	19.88	23.48
34.0	9.76	11.97	14.52	17.48	20.44	24.14
35.0	10.01	12.28	14.91	17.95	21.00	24.81
36.0	10.25	12.59	15.29	18.42	21.55	25.48
37.0	10.49	12.90	15.67	18.89	22.11	26.14
38.0	10.73	13.20	16.06	19.36	22.67	26.81
39.0	10.98	13.51	16.44	19.83	23.22	27.47
40.0	11.22	13.82	16.82	20.30	23.78	28.14
41.0	11.46	14.13	17.20	20.77	24.34	28.81
42.0	11.71	14.44	17.59	21.24	24.89	29.47
43.0	11.95	14.74	17.97	21.71	25.45	30.14
44.0	12.19	15.05	18.35	22.18	26.01	30.80
45.0	12.44	15.36	18.74	22.65	26.57	31.47
46.0	12.68	15.67	19.12	23.12	27.12	32.14
47.0	12.92	15.98	19.50	23.59	27.68	32.80
48.0	13.16	16.28	19.88	24.06	28.24	33.47
49.0	13.41	16.59	20.27	24.53	28.79	34.13
50.0	13.65	16.90	20.65	25.00	29.35	34.80
51.0	13.89	17.21	21.03	25.47	29.91	35.47
52.0	14.14	17.52	21.42	25.94	30.46	36.13
53.0	14.38	17.82	21.80	26.41	31.02	36.80
54.0	14.62	18.13	22.18	26.88	31.58	37.46
55.0	14.87	18.44	22.57	27.35	32.14	38.13
56.0	15.11	18.75	22.95	27.82	32.69	38.80
57.0	15.35	19.06	23.33	28.29	33.25	39.46
58.0	15.59	19.36	23.71	28.76	33.81	40.13
59.0	15.84	19.67	24.10	29.23	34.36	40.79
60.0	16.08	19.98	24.48	29.70	34.92	41.46
61.0	16.32	20.28	24.86	30.17	35.48	42.13
62.0	16.57	20.59	25.25	30.64	36.03	42.79
63.0	16.81	20.90	25.63	31.11	36.59	43.46
64.0	17.05	21.21	26.01	31.58	37.15	44.12
65.0	17.30	21.52	26.40	32.05	37.71	44.79
66.0	17.54	21.82	26.78	32.52	38.26	45.46
67.0	17.78	22.13	27.16	32.99	38.82	46.12
68.0	18.02	22.44	27.54	33.46	39.38	46.79
69.0	18.27	22.75	27.93	33.93	39.93	47.45
70.0	18.51	23.06	28.31	34.40	40.49	48.12

APPENDIX I

SCHEDULE B-1

Second-Class Mail: In-County, Transient, and Commingled Non-Subscriber Copies[1/]

Mail Type	Full Rate (cents)
In-County	
Pound-rate matter:	
Per-pound	5.4
Per-piece	3.4
Transient	
First 2 ounces	10
Each additional ounce	6
Commingled Non-Subscriber Copies[1/]	
Per-pound	15.3
Per-piece	5.8

1/ Includes sample copies in excess of the 10 percent allowance and complimentary copies.

APPENDIX I

SCHEDULE B-2

Second-Class Mail: Publications
of Authorized Nonprofit
Organizations, Outside County

	Postage Rate Unit	Full Rate[1] (cents)
Per-pound		
Non-advertising portion	Pound	11.2
Advertising portion:[2]		
Zone: 1 & 2	Pound	15.8
3	Pound	16.5
4	Pound	17.6
5	Pound	19.7
6	Pound	22.5
7	Pound	25.1
8	Pound	27.6
Per-piece	Piece	5.6

1/ Charges for second-class nonprofit mail are computed by adding the per-piece charge to the sum of the non-advertising portion charge and the advertising portion charge, as applicable.

2/ Not applicable to publications containing 10 percent or less advertising content.

APPENDIX I

SCHEDULE B-3

Second-Class Mail: Classroom Publications, Outside County

	Postage Rate Unit	Full Rate[1/] (cents)
Per-pound		
Non-advertising portion	Pound	5.4
Advertising portion:		
Zone: 1 & 2	Pound	7.2
3	Pound	7.6
4	Pound	8.9
5	Pound	11.2
6	Pound	14.2
7	Pound	17.0
8	Pound	18.9
Per-piece	Piece	3.0

1/ Charges for classroom publications are computed by adding the per-piece charge to the sum of the non-advertising portion charge and the advertising portion charge, as applicable.

SCHEDULE B-4

Second-Class Mail: Regular Rate
Publications, Outside County

	Postage Rate Unit	Full Rate[1] (cents)
Per-pound		
Non-advertising portion	Pound	13.1
Advertising portion:		
Zone: 1 & 2	Pound	17.5[2]
3	Pound	18.4
4	Pound	19.9
5	Pound	22.7
6	Pound	26.0
7	Pound	29.4
8	Pound	31.8
Per-piece		
5,000 or more copies per issue outside the county of publication		
Category A Outgoing/incoming distribution required: SCF, States, and mixed States	Piece	7.0
Category B Incoming distribution only required: 3-digit city and 5-digit	Piece	5.4
Category C By-pass outgoing and incoming distribution: carrier route or finer presortation	Piece	4.4
Less than 5,000 copies per issue outside the county of publication		
Presorted to 3-digit City/5 digits	Piece	4.3
Not presorted to 3-digit City/5 digits	Piece	5.9

1/ Charges for second-class regular rate mail are computed by adding the appropriate per-piece charge to the sum of the non-advertising portion and the advertising portion charge, as applicable.

2/ Per-pound advertising portion rate for science of agriculture publications mailed to zones 1 and 2 is 15.8 cents.

APPENDIX I

SCHEDULE C

Controlled Circulation Mail

	Full Rate (cents)
Per-pound	15.3
Per-piece	5.8

APPENDIX I

SCHEDULE D

Third-Class Mail

	Full Rate (cents)
Single-Piece	
First 2 ounces	20
Next 2 ounces	20
Each additional 2 ounces	13
Keys and Identification Devices	
First 2 ounces	32
Each additional 2 ounces	18
Regular Bulk[1/]	
Per-pound	
Ordinary matter[2/]	41
Books, catalogs, etc.[3/]	36
Minimum-per-piece	8.4
Nonprofit Bulk[1/]	
Per-pound	
Ordinary matter[2/]	34
Books, catalogs, etc.[3/]	29
Minimum-per-piece	6.1

1/ A fee of $40.00 must be paid once each calendar year for each bulk mailing permit.

2/ Ordinary matter includes all regular and nonprofit bulk matter except: books and catalogs of 24 bound pages or more, seeds, cuttings, bulbs, roots, scions, and plants.

3/ Books and catalogs of 24 bound pages or more, seeds, cuttings, bulbs, roots, scions, and plants.

SCHEDULE E-1

Fourth-Class Mail: Special and Library Rates

	Full Rate (cents)
Special:	
First pound	
Not presorted	59
Presorted to 5-digits 1/ 2/	52
Presorted to 3-digits 1/ 3/	55
Each additional pound through 7 pounds	22
Each additional pound over 7 pounds	13
Library:	
First pound	38
Each additional pound through 7 pounds	13
Each additional pound over 7 pounds	7

1/ A fee of $30.00 must be paid once each calendar year for each permit

2/ For mailings of 500 or more pieces properly prepared and presorted to five-digit destination ZIP Codes (§400.331a(1) of the Classification Schedule effective July 6, 1976).

3/ For mailings of 2,000 or more pieces properly prepared and presorted to five-digit and three-digit destination ZIP Codes (§403.331a(2) of the Classification Schedule effective July 6, 1976).

APPENDIX I

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SCHEDULE E-2

Fourth-Class Mail: Single-Piece Bound Printed Matter[1/]

Rates for Pieces Weighing Up to (Pounds)	Zones (Dollars)							
	Local	1&2	3	4	5	6	7	8
1.5	.69	.92	.94	.97	1.02	1.08	1.16	1.19
2	.69	.93	.95	.99	1.06	1.14	1.25	1.28
2.5	.69	.93	.96	1.01	1.10	1.20	1.33	1.38
3	.69	.94	.97	1.03	1.14	1.25	1.41	1.47
3.5	.69	.94	.98	1.05	1.17	1.31	1.50	1.56
4	.69	.95	.99	1.07	1.21	1.37	1.58	1.66
4.5	.69	.95	1.00	1.09	1.25	1.42	1.67	1.75
5	.70	.96	1.02	1.12	1.29	1.48	1.75	1.85
6	.70	.96	1.04	1.16	1.36	1.59	1.92	2.03
7	.70	.97	1.06	1.20	1.44	1.71	2.09	2.22
8	.70	.98	1.08	1.24	1.51	1.82	2.25	2.41
9	.70	.99	1.10	1.28	1.59	1.94	2.42	2.59
10	.70	1.00	1.12	1.32	1.66	2.05	2.59	2.78
Per piece (dollars)	.69	.91	.91	.91	.91	.91	.91	.91
Per Pound (cents)	.1	.9	2.1	4.1	7.5	11.4	16.8	18.7

1/ Includes both catalogs and similar bound printed matter ($400.51 of the Classification Schedule effective July 6, 1976).

SCHEDULE E-3

Fourth-Class Mail: Bulk Bound Printed Matter[1/]

Zones	Per Piece (cents)	Per Pound (cents)
Local	35	.1
1&2	46	.9
3	46	2.1
4	46	4.1
5	46	7.5
6	46	11.4
7	46	16.8
8	46	18.7

1/ Includes both catalogs and similar bound printed matter (§400.51 of the Classification Schedule effective July 6, 1976).

APPENDIX I

SCHEDULE E-4

PARCEL POST RATE SCHEDULE

WEIGHT NOT EXCEEDING (POUNDS)	Local	1&2	3	4	5	6	7	8
2	1.15	1.35	1.39	1.56	1.72	1.84	1.98	2.22
3	1.23	1.45	1.53	1.73	1.86	2.04	2.24	2.51
4	1.29	1.56	1.65	1.82	2.00	2.23	2.50	3.00
5	1.36	1.66	1.77	1.92	2.14	2.43	2.77	3.29
6	1.42	1.71	1.84	2.01	2.28	2.62	3.03	3.78
7	1.47	1.76	1.90	2.11	2.41	2.82	3.25	4.17
8	1.51	1.80	1.97	2.20	2.55	3.02	3.56	4.55
9	1.54	1.85	2.03	2.29	2.69	3.21	3.82	4.95
10	1.57	1.89	2.10	2.39	2.83	3.41	4.08	5.34
11	1.60	1.94	2.17	2.50	3.00	3.65	4.42	5.73
12	1.64	1.98	2.22	2.56	3.09	3.77	4.57	6.12
13	1.67	2.02	2.27	2.63	3.17	3.89	4.72	6.41
14	1.70	2.05	2.32	2.69	3.25	3.99	4.86	6.62
15	1.73	2.05	2.36	2.74	3.23	4.09	4.99	6.30
16	1.76	2.12	2.41	2.80	3.40	4.19	5.11	6.58
17	1.79	2.16	2.45	2.85	3.47	4.28	5.23	7.15
18	1.82	2.20	2.49	2.91	3.54	4.37	5.34	7.31
19	1.86	2.23	2.53	2.96	3.61	4.46	5.45	7.47
20	1.89	2.27	2.58	3.01	3.67	4.54	5.55	7.62
21	1.92	2.30	2.62	3.06	3.74	4.62	5.66	7.76
22	1.95	2.34	2.66	3.14	3.85	4.78	5.90	7.90
23	1.98	2.37	2.72	3.25	3.99	4.96	6.02	8.02
24	2.01	2.44	2.80	3.35	4.12	5.13	6.24	8.16
25	2.04	2.51	2.89	3.46	4.26	5.31	6.46	8.29
26	2.07	2.58	2.97	3.56	4.39	5.48	6.68	8.40
27	2.11	2.65	3.06	3.67	4.53	5.66	6.90	8.52
28	2.14	2.72	3.14	3.77	4.66	5.83	7.12	8.63
29	2.17	2.79	3.23	3.86	4.80	6.01	7.34	8.75
30	2.20	2.86	3.31	3.98	4.93	6.18	7.56	8.85
31	2.68	3.09	3.46	4.09	5.07	6.36	7.78	9.41
32	2.71	3.12	3.49	4.19	5.20	6.53	8.00	9.51
33	2.74	3.16	3.57	4.30	5.34	6.71	8.22	9.61
34	2.77	3.19	3.65	4.40	5.47	6.88	8.44	9.80
35	2.80	3.22	3.74	4.51	5.61	7.06	8.66	10.06
36	2.93	3.28	3.82	4.61	5.74	7.23	8.88	10.22
37	2.86	3.35	3.91	4.72	5.88	7.41	9.10	10.58
38	2.89	3.42	3.99	4.82	6.01	7.58	9.32	10.84
39	2.93	3.49	4.08	4.93	6.15	7.76	9.54	11.10
40	2.96	3.56	4.16	5.03	6.28	7.93	9.76	11.36
41	2.95	3.63	4.25	5.14	6.42	8.11	9.98	11.62
42	3.02	3.70	4.33	5.24	6.55	8.28	10.20	11.68
43	3.05	3.77	4.42	5.35	6.69	8.46	10.42	12.14
44	3.08	3.84	4.50	5.45	6.82	8.63	10.64	12.40
45	3.11	3.91	4.59	5.56	6.96	8.81	10.86	12.66
46	3.14	3.98	4.67	5.66	7.09	8.98	11.08	12.92
47	3.17	4.05	4.76	5.77	7.23	9.16	11.30	13.18
48	3.20	4.12	4.84	5.87	7.36	9.33	11.52	13.44
49	3.23	4.19	4.93	5.98	7.50	9.51	11.74	13.70
50	3.27	4.26	5.01	6.08	7.63	9.68	11.96	13.96
51	3.30	4.33	5.10	6.19	7.77	9.86	12.18	14.22
52	3.33	4.40	5.18	6.29	7.90	10.03	12.40	14.48
53	3.36	4.47	5.27	6.40	8.04	10.21	12.62	14.74
54	3.39	4.54	5.35	6.50	8.17	10.38	12.84	15.00
55	3.42	4.61	5.44	6.61	8.31	10.56	13.06	15.26
56	3.45	4.68	5.52	6.71	8.44	10.73	13.28	15.52
57	3.48	4.75	5.61	6.82	8.58	10.91	13.50	15.78
58	3.51	4.82	5.69	6.92	8.71	11.08	13.72	16.04
59	3.54	4.89	5.78	7.03	8.85	11.26	13.94	16.30
60	3.57	4.96	5.86	7.13	8.98	11.43	14.16	16.56
61	3.60	5.03	5.95	7.24	9.12	11.61	14.38	16.82
62	3.64	5.10	6.03	7.34	9.25	11.78	14.60	17.08
63	3.67	5.17	6.12	7.45	9.39	11.96	14.82	17.34
64	3.70	5.24	6.20	7.55	9.52	12.13	15.04	17.60
65	3.73	5.31	6.29	7.66	9.66	12.31	15.26	17.86
66	3.76	5.38	6.37	7.76	9.79	12.48	15.48	18.12
67	3.79	5.45	6.46	7.87	9.93	12.66	15.70	18.38
68	3.82	5.52	6.54	7.97	10.06	12.83	15.92	18.64
69	3.85	5.59	6.63	8.08	10.20	13.01	16.14	18.90
70	3.88	5.66	6.71	8.18	10.33	13.18	16.36	19.16

Exception: Parcels weighing less than 15 pounds, measuring over 84 inches but not exceeding 100 inches in length and girth combined, are chargeable with a minimum rate equal to that for a 15-pound parcel for the zone to which addressed.

SCHEDULE F-1

Express Mail Rates:

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
1	$ 5.55	$ 6.60	$ 6.65	$ 6.75	$ 6.85	$ 6.95	$ 7.05
2	6.95	7.00	7.15	7.25	7.40	7.55	7.70
3	7.35	7.45	7.60	7.75	7.95	8.15	8.35
4	7.75	7.90	8.10	8.30	8.50	8.75	9.00
5	8.15	8.30	8.55	8.80	9.05	9.35	9.65
6	8.55	8.75	9.00	9.30	9.60	9.95	10.30
7	8.95	9.15	9.50	9.80	10.15	10.55	11.00
8	9.35	9.60	9.95	10.30	10.70	11.15	11.60
9	9.75	10.05	10.45	10.85	11.25	11.75	12.25
10	10.15	10.45	10.90	11.35	11.80	12.35	12.90
11	10.55	10.90	11.35	11.85	12.35	12.95	13.55
12	10.95	11.30	11.85	12.35	12.90	13.55	14.20
13	11.35	11.75	12.30	12.85	13.45	14.15	14.85
14	11.75	12.20	12.80	13.40	14.00	14.75	15.50
15	12.15	12.60	13.25	13.90	14.55	15.35	16.15
16	12.55	13.05	13.70	14.40	15.10	15.95	16.80
17	12.95	13.50	14.20	14.90	15.65	16.55	17.45
18	13.35	13.90	14.65	15.40	16.20	17.15	18.10
19	13.75	14.35	15.15	15.95	16.75	17.75	18.75
20	14.15	14.75	15.60	16.45	17.30	18.35	19.40
21	14.55	15.20	16.05	16.95	17.85	18.95	20.05
22	14.95	15.60	16.55	17.45	18.40	19.55	20.70
23	15.35	16.05	17.00	17.95	18.95	20.15	21.35
24	15.75	16.50	17.50	18.50	19.50	20.75	22.00
25	16.15	16.90	17.95	19.00	20.05	21.35	22.65
26	16.55	17.35	18.40	19.50	20.60	21.95	23.30
27	16.95	17.75	18.90	20.00	21.15	22.55	23.95
28	17.35	18.20	19.35	20.50	21.70	23.15	24.60
29	17.75	18.65	19.85	21.05	22.25	23.75	25.25
30	18.15	19.05	20.30	21.55	22.80	24.35	25.90
31	18.55	19.50	20.75	22.05	23.35	24.95	26.55
32	18.95	19.90	21.25	22.55	23.90	25.55	27.20
33	19.35	20.35	21.70	23.05	24.45	26.15	27.85
34	19.75	20.80	22.20	23.60	25.00	26.75	28.50
35	20.15	21.20	22.65	24.10	25.55	27.35	29.15

Airport to Airport

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
36	20.55	21.65	23.10	24.60	26.10	27.95	29.60
37	20.95	22.05	23.60	25.10	26.65	28.55	30.45
38	21.35	22.50	24.05	25.60	27.20	29.15	31.10
39	21.75	22.95	24.55	26.15	27.75	29.75	31.75
40	22.15	23.35	25.00	26.65	28.20	30.35	32.40
41	22.55	23.80	25.45	27.15	28.85	30.95	33.05
42	22.95	24.20	25.95	27.65	29.40	31.55	33.70
43	23.35	24.65	26.40	28.15	29.95	32.15	34.35
44	23.75	25.10	25.90	28.70	30.50	32.75	35.00
45	24.15	25.50	27.35	29.20	31.05	33.35	35.65
46	24.55	25.95	27.80	29.70	31.60	33.95	36.30
47	24.95	26.35	28.30	30.20	32.15	34.55	36.95
48	25.35	26.80	28.75	30.70	32.70	35.15	37.60
49	25.75	27.25	29.25	31.25	33.25	35.75	38.25
50	26.15	27.65	29.70	31.75	33.80	36.35	38.90
51	26.55	28.10	30.15	32.25	34.35	36.95	39.55
52	26.95	28.50	30.65	32.75	34.90	37.55	40.20
53	27.35	28.95	31.10	33.25	35.45	38.15	40.85
54	27.75	29.40	31.60	33.80	36.00	38.75	41.50
55	28.15	29.80	32.05	34.30	36.55	39.35	42.15
56	28.55	30.25	32.50	34.80	37.10	39.95	42.80
57	28.95	30.65	33.00	35.30	37.65	40.55	43.45
58	29.35	31.10	33.45	35.80	38.20	41.15	44.10
59	29.75	31.55	33.95	36.35	38.75	41.75	44.75
60	30.15	31.95	34.40	36.85	39.30	42.35	45.40
61	30.55	32.40	34.85	37.35	39.85	42.95	46.05
62	30.95	32.80	35.35	37.85	40.40	43.55	46.70
63	31.35	33.25	35.80	38.35	40.95	44.15	47.35
64	31.75	33.70	36.30	38.90	41.50	44.75	48.00
65	32.15	34.10	36.75	39.40	42.05	45.35	48.65
66	32.55	34.55	37.20	39.90	42.60	45.95	49.30
67	32.95	34.95	37.70	40.40	43.15	46.55	49.95
68	33.35	35.40	38.15	40.90	43.70	47.15	50.60
69	33.75	35.85	38.65	41.55	44.25	47.75	51.25
70	$34.15	$36.25	$39.10	$41.95	$44.80	$48.35	$51.90

1/ The rates for Programmed Service are subject to the following:

a. If tendered at origin airport mail facility deduct $3.00.

b. If tendered for claim by addressee at destination airport mail facility deduct $3.00.

c. If tendered at origin airport mail facility for claim by addressee at destination airport mail facility deduct $6.00.

d. Add $5.25 for each delivery stop for item(s) tendered for delivery to addressee.

e. For each collection stop, add $5.25 per occurrence.

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
1	$12.55	$12.60	$12.65	$12.75	$12.85	$12.95	$13.05
2	12.95	13.00	13.15	13.25	13.40	13.55	13.70
3	13.35	13.45	13.60	13.75	13.95	14.15	14.35
4	13.75	13.90	14.10	14.30	14.50	14.75	15.00
5	14.15	14.30	14.55	14.80	15.05	15.35	15.65
6	14.55	14.75	15.00	15.30	15.60	15.95	16.30
7	14.95	15.15	15.50	15.80	16.15	16.55	16.95
8	15.35	15.60	15.95	16.30	16.70	17.15	17.60
9	15.75	16.05	16.45	16.85	17.25	17.75	18.25
10	16.15	16.45	16.90	17.35	17.80	18.35	18.90
11	16.55	16.90	17.35	17.85	18.35	18.95	19.55
12	16.95	17.30	17.85	18.35	18.90	19.55	20.20
13	17.35	17.75	18.30	18.85	19.45	20.15	20.85
14	17.75	18.20	18.80	19.40	20.00	20.75	21.50
15	18.15	18.60	19.25	19.90	20.65	21.35	22.15
16	18.55	19.05	19.70	20.40	21.10	21.95	22.80
17	18.95	19.45	20.20	20.90	21.65	22.55	23.45
18	19.35	19.90	20.65	21.40	22.20	23.15	24.10
19	19.75	20.35	21.15	21.95	22.75	23.75	24.75
20	20.15	20.75	21.50	22.45	23.30	24.35	25.40
21	20.55	21.20	22.05	22.95	23.85	24.95	26.05
22	20.95	21.60	22.55	23.45	24.40	25.55	26.70
23	21.35	22.05	23.00	23.95	24.95	26.15	27.35
24	21.75	22.50	23.50	24.50	25.50	26.75	28.00
25	22.15	22.90	23.95	25.00	26.05	27.35	28.65
26	22.55	23.35	24.40	25.50	26.50	27.95	29.30
27	22.95	23.75	24.90	26.00	27.10	28.55	29.95
28	23.35	24.20	25.35	26.50	27.70	29.15	30.60
29	23.75	24.65	25.85	27.05	28.25	29.75	31.25
30	24.15	25.05	26.30	27.65	28.80	30.35	31.90
31	24.55	25.50	26.75	28.05	29.35	30.95	32.55
32	24.95	25.90	27.25	28.55	29.90	31.55	33.20
33	25.35	26.35	27.70	29.05	30.45	32.15	33.85
34	25.75	26.80	28.20	29.60	31.00	32.75	34.50
35	26.15	27.20	28.65	30.10	31.55	33.35	35.15

SCHEDULE F-2

Express Mail Rates: Programmed Service

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
36	26.55	27.85	29.10	30.60	32.10	33.95	35.80
37	26.95	28.05	29.60	31.10	32.65	34.55	36.45
38	27.35	28.80	30.05	31.60	33.20	35.15	37.10
39	27.75	28.95	30.55	32.15	33.75	35.75	37.75
40	28.15	29.35	31.00	32.65	34.30	36.35	38.40
41	28.55	29.80	31.45	33.15	34.85	36.95	39.05
42	28.95	30.20	31.95	33.65	35.40	37.55	39.70
43	29.35	30.65	32.40	34.15	35.95	38.15	40.35
44	29.75	31.10	32.90	34.70	36.50	38.75	41.00
45	30.15	31.50	33.35	35.20	37.05	39.35	41.65
46	30.55	31.95	33.80	35.70	37.60	39.95	42.30
47	30.95	32.35	34.30	36.20	38.15	40.55	42.95
48	31.35	32.80	34.75	36.70	38.70	41.15	43.60
49	31.75	33.25	35.25	37.25	39.25	41.75	44.25
50	32.15	33.65	35.70	37.75	39.80	42.35	44.90
51	32.55	34.10	36.15	38.25	40.35	42.95	45.55
52	32.95	34.50	36.65	38.75	40.90	43.55	46.20
53	33.35	34.95	37.10	39.25	41.45	44.15	46.85
54	33.75	35.40	37.60	39.80	42.00	44.75	47.50
55	34.15	35.80	38.05	40.30	42.55	45.35	48.15
56	34.55	36.25	38.50	40.80	43.10	45.95	48.80
57	34.95	36.65	39.00	41.30	43.65	46.55	49.45
58	35.35	37.10	39.45	41.80	44.20	47.15	50.10
59	35.75	37.55	39.95	42.35	44.75	47.75	50.75
60	36.15	37.95	40.40	42.85	45.30	48.35	51.40
61	36.55	38.40	40.85	43.35	45.85	48.95	52.05
62	36.95	38.80	41.35	43.85	46.40	49.55	52.70
63	37.35	39.25	41.80	44.35	46.95	50.15	53.35
64	37.75	39.70	42.30	44.90	47.50	50.75	54.00
65	38.15	40.10	42.75	45.40	48.05	51.35	54.65
66	38.55	40.55	43.20	45.90	48.60	51.95	55.30
67	38.95	40.95	43.70	46.40	49.15	52.55	55.95
68	39.35	41.40	44.15	46.90	49.70	53.15	56.60
69	39.75	41.85	44.65	47.45	50.25	53.75	57.25
70	$40.15	$42.25	$45.10	$47.95	$50.80	$54.35	$57.90

1/ For each collection stop, add $5.25 per occurrence.

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
1	$ 7 50	$ 7 55	$ 7 65	$ 7 70	$ 7 80	$ 7 90	$ 8 00
2	7 90	8 00	8 10	8 25	8 35	8 50	8 65
3	8 30	8 40	8 60	8 75	8 90	9 10	9 30
4	8 70	8 85	9 05	9 25	9 45	9 70	9 95
5	9 10	9 30	9 50	9 75	10 00	10 30	10 60
6	9 50	9 70	10 00	10 25	10 55	10 90	11 25
7	9 90	10 15	10 45	10 80	11 10	11 50	11 90
8	10 30	10 55	10 95	11 30	11 65	12 10	12 55
9	10 70	11 00	11 40	11 80	12 20	12 70	13 20
10	11 10	11 45	11 85	12 20	12 75	13 30	13 85
11	11 50	11 85	12 35	12 80	13 30	13 90	14 50
12	11 90	12 30	12 80	13 35	13 85	14 50	15 15
13	12 30	12 70	13 30	13 85	14 40	15 10	15 80
14	12 70	13 15	13 75	14 35	14 95	15 70	16 45
15	13 10	13 60	14 20	14 85	15 50	16 30	17 10
16	13 50	14 00	14 70	15 35	16 05	16 90	17 75
17	13 90	14 45	15 15	15 90	16 60	17 50	18 40
18	14 30	14 85	15 65	16 40	17 15	18 10	19 05
19	14 70	15 30	16 10	16 90	17 70	18 70	19 70
20	15 10	15 75	16 55	17 40	18 25	19 30	20 35
21	15 50	16 15	17 05	17 90	10 80	19 90	21 00
22	15 90	16 60	17 50	18 45	19 35	20 50	21 65
23	16 30	17 00	18 00	18 95	19 90	21 10	22 30
24	16 70	17 45	18 45	19 45	20 45	21 70	22 95
25	17 10	17 90	18 90	19 95	21 00	22 30	23 60
26	17 50	18 30	19 40	20 45	21 55	22 90	24 25
27	17 90	18 75	19 85	21 00	22 10	23 50	24 90
28	18 30	19 15	20 35	21 50	22 65	24 10	25 55
29	18 70	19 60	20 80	22 00	23 20	24 70	26 20
30	19 10	20 05	21 25	22 50	23 75	25 30	26 85
31	19 50	20 45	21 75	23 00	24 30	25 90	27 50
32	19 90	20 90	22 20	23 55	24 85	26 50	28 15
33	20 30	21 30	22 70	24 05	25 40	27 10	28 80
34	20 70	21 75	23 15	24 55	25 95	27 70	29 45
35	21 10	22 20	23 60	25 05	26 50	28 30	30 10

SCHEDULE F-3

Express Mail Rates: Post Office to Addressee 1/

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
36	21 50	22 60	24 10	25 55	27 05	28 90	30 75
37	21 90	23 05	24 55	26 10	27 60	29 50	31 40
38	22 30	23 45	25 05	26 60	28 15	30 10	32 05
39	22 70	23 90	25 50	27 10	28 70	30 70	32 70
40	23 10	24 35	25 95	27 60	29 25	31 30	33 35
41	23 50	24 75	26 45	28 10	29 80	31 90	34 00
42	23 90	25 20	26 90	28 65	30 35	32 50	34 65
43	24 30	25 60	27 40	29 15	30 90	33 10	35 30
44	24 70	26 05	27 85	29 65	31 45	33 70	35 95
45	25 10	26 50	28 30	30 15	32 00	34 30	36 60
46	25 50	26 90	28 80	30 65	32 55	34 90	37 25
47	25 90	27 35	29 25	31 20	33 10	35 50	37 90
48	26 30	27 75	29 75	31 70	33 65	36 10	38 55
49	26 70	28 20	30 20	32 20	34 20	36 70	39 20
50	27 10	28 65	30 65	32 70	34 75	37 30	39 85
51	27 50	29 05	31 15	33 20	35 30	37 90	40 50
52	27 90	29 50	31 60	33 75	35 85	38 50	41 15
53	28 30	29 90	32 10	34 25	36 40	39 10	41 80
54	28 70	30 35	32 55	34 75	36 95	39 70	42 45
55	29 10	30 80	33 00	35 25	37 50	40 30	43 10
56	29 50	31 20	33 50	35 75	38 05	40 90	43 75
57	29 90	31 65	33 95	36 30	38 60	41 50	44 40
58	30 30	32 05	34 45	36 80	39 15	42 10	45 05
59	30 70	32 50	34 90	37 30	39 70	42 70	45 70
60	31 10	32 95	35 35	37 80	40 25	43 30	46 35
61	31 50	33 35	35 85	38 30	40 80	43 90	47 00
62	31 90	33 80	36 30	38 85	41 35	44 50	47 65
63	32 30	34 20	36 80	39 35	41 90	45 10	48 30
64	32 70	34 65	37 25	39 85	42 45	45 70	48 95
65	33 10	35 10	37 70	40 35	43 00	46 30	49 60
66	33 50	35 50	38 20	40 85	43 55	46 90	50 25
67	33 90	35 95	38 65	41 40	44 10	47 50	50 90
68	34 30	36 35	39 15	41 90	44 65	48 10	51 55
69	34 70	36 80	39 60	42 40	45 20	48 70	52 20
70	$35 10	$37 25	$40 05	$42 90	$45 75	$49 30	$52 85

1/ For each collection stop, add $5.25 per occurrence.

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
1	$ 5 40	$ 5 45	$ 5 55	$ 5 60	$ 5 70	$ 5 80	$ 5 90
2	5 80	5 90	6 00	6 15	6 25	6 40	5 55
3	6 20	6 30	6 50	6 65	6 80	7 00	7 20
4	6 60	6 75	6 95	7 15	7 35	7 60	7 85
5	7 00	7 20	7 40	7 65	7 90	8 20	8 50
6	7 40	7 60	7 90	8 15	8 45	8 80	9 15
7	7 80	8 05	8 35	8 70	9 00	9 40	9 80
8	8 20	8 45	8 85	9 20	9 55	10 00	10 45
9	8 60	8 90	9 30	9 70	10 10	10 60	11 10
10	9 00	9 35	9 75	10 20	10 65	11 20	11 75
11	9 40	9 75	10 25	10 70	11 20	11 80	12 40
12	9 80	10 20	10 70	11 25	11 75	12 40	13 05
13	10 20	10 60	11 20	11 75	12 30	13 00	13 70
14	10 60	11 05	11 65	12 25	12 85	13 60	14 35
15	11 00	11 50	12 10	12 75	13 40	14 20	15 00
16	11 40	11 90	12 60	13 25	13 95	14 80	15 65
17	11 80	12 35	13 05	13 80	14 50	15 10	16 30
18	12 20	12 75	13 55	14 30	15 05	16 00	16 95
19	12 60	13 20	14 00	14 80	15 60	16 60	17 60
20	13 00	13 65	14 45	15 30	16 15	17 20	18 25
21	13 40	14 05	14 95	15 80	16 70	17 80	18 90
22	13 80	14 50	15 40	16 35	17 25	18 40	19 55
23	14 20	14 90	15 90	16 85	17 80	19 00	20 20
24	14 60	15 35	16 35	17 35	18 35	19 60	20 85
25	15 00	15 80	16 80	17 85	18 90	20 20	21 50
26	15 40	16 20	17 30	18 35	19 45	20 80	22 15
27	15 80	16 65	17 75	18 90	20 00	21 40	22 80
28	16 20	17 10	18 35	19 40	20 55	22 00	23 45
29	16 60	17 50	18 70	19 90	21 10	22 60	24 10
30	17 00	17 95	19 15	20 40	21 65	23 20	24 75
31	17 40	18 35	19 65	20 90	22 20	23 80	25 40
32	17 80	18 80	20 10	21 45	22 75	24 40	26 05
33	18 20	19 20	20 60	21 95	23 30	25 00	26 70
34	18 60	19 65	21 05	22 45	23 85	25 60	27 35
35	19 00	20 10	21 50	22 95	24 40	26 20	28 00

SCHEDULE F-4

Express Mail Rates: Post Office to Post Office

POUNDS (up to and including)	ZONES						
	3	4	5	6	7	8	9
36	19 40	20 50	22 00	23 45	24 95	26 80	28 65
37	19 80	20 95	22 45	24 00	25 50	27.40	29 30
38	20 20	21 40	22 95	24 50	26 05	28 00	29 95
39	20 60	21 80	23 40	25 00	26 60	28 60	30 60
40	21 00	22 25	23 85	25 50	27.15	29 20	31 25
41	21 40	22 65	24 35	26 00	27 70	29 80	31 90
42	21 80	23 10	24 80	26 50	28 25	30 40	32 55
43	22 20	23 50	25 30	27 05	28 80	31 00	33 20
44	22 60	23 95	25 75	27 55	29 35	31 60	33 85
45	23 00	24 40	26 20	28 05	29 90	32 20	34 50
46	23 40	24 80	26 70	28 55	30 45	32 80	35 15
47	23 80	25 25	27 15	29 10	31 00	33 40	35 80
48	24 20	25 65	27 65	29 60	31 55	34 00	36 45
49	24 60	26 10	28 10	30 10	32 10	34 60	37 10
50	25 00	26 55	28 55	30 60	32 65	35 20	37 75
51	25 40	26 95	29 05	31 10	33 20	35 80	38 40
52	25 80	27 40	29 50	31 65	33 75	36 40	39 05
53	26 20	27 80	30 00	32 15	34 30	37 00	39 70
54	26 60	28 25	30 45	32 65	34 85	37 60	40 35
55	27 00	28 70	30 90	33 15	35 40	38 20	41 00
56	27 40	29 10	31 40	33 65	35 95	38 80	41 65
57	27 80	29 55	31 85	34 20	36 50	39 40	42 30
58	28 20	30 00	32 35	34 70	37 05	40 00	42 95
59	28 60	30 40	32 80	35 20	37 60	40 60	43 60
60	29 00	30 85	33 25	35 70	38 15	41 20	44 25
61	29 40	31 25	33 75	36 20	38 70	41 80	44 90
62	29 80	31 70	34 20	36 75	39 25	42 40	45 55
63	30 20	32 10	34 70	37 25	39 80	43 00	46 20
64	30 60	32 55	35 15	37 75	40 35	43 60	46 85
65	31 00	33 00	35 60	38 25	40 90	44 20	47 50
66	31 40	33 40	36 10	38 75	41 45	44 80	48 15
67	31 80	33 85	36 55	39 30	42 00	45 40	48 80
68	32 20	34 25	37 05	39 80	42 55	46 00	49 45
69	32 60	34 70	37 50	40 30	43 10	46 60	50 10
70	$33 00	$35 15	$37 95	$40 80	$43 65	$47 20	$50 75

APPENDIX I

SCHEDULE C-1

Special Services: Address Corrections

Description	Fee
Per Correction	$ 0.25

SCHEDULE G-2

Special Services: Certificates of Mailing

Description	Fees (in addition to postage)
Individual Pieces	
Original certificate of mailing for individually listed pieces of all classes of ordinary mail	$ 0.15 each
Each additional copy of original certificate of mailing or original mailing receipt for registered, insured, certified and c.o.d. mail	0.15 each
Bulk Pieces	
Identical pieces of first- and third-class mail paid with ordinary stamps, precanceled stamps or meter stamps:	
Up to 1,000 pieces (1 certificate for total number)	0.75
Each additional 1,000 pieces or fraction	0.15
Duplicate copy	0.15

APPENDIX I

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SCHEDULE G-3

Special Services: Certified Mail

Description	Fees (in addition to postage)
Per-piece	$ 0.80

SCHEDULE G-4

Special Services: Collect on Delivery

Amount to be Collected, or Insurance Coverage Desired	Fees (in addition to postage)
$ 0.01 to $ 10	$ 1.10
10.01 to 25	1.35
25.01 to 50	1.65
50.01 to 100	1.95
100.01 to 200	2.30
200.01 to 300	2.75
300.01 to 400	3.25
Notice of nondelivery of C.O.D.	1.00
Alteration of C.O.D. charges or designation of new addressee	1.00
Registered C.O.D.	1.40

APPENDIX I

SCHEDULE G-5

Special Services: Dead Letter Return

Description	Fee
Per-piece (first-class letters and parcels only)	$ 0.40

APPENDIX I

SCHEDULE G-6

Special Services: Insured Mail

Liability	Fees (in addition to postage)
$ 0.01 to $ 15	$ 0.50
15.01 to 50	0.85
50.01 to 100	1.10
100.01 to 150	1.40
150.01 to 200	1.75
200.01 to 300	2.25
300.01 to 400	2.75

APPENDIX I

SCHEDULE G-7

Special Services: LockBox/Caller Service

A. RENTAL RATES FOR LOCKBOXES

Cubic inch capacity of lockboxes	Fee per semi-annual period				
	TO 265	266 to	500 to	1,000 to	2,000 and over
Box size	1	2	3	4	5
Group I:					
Subgroup A	$14	$20	$28	$40	$55
Subgroup B	10	14	20	30	40
Subgroup C	8	11	15	24	30
Group II:					
Subgroup D	2.50	4	5	7.50	10
Subgroup E	2	3	4	6	8
Subgroup F	1.50	1.50	1.50	1.50	1.50

B. CALLER SERVICE

Description	Fees
For Caller Service (semi-annual)	$60
For Each Reserved Cali Number (annual)	10

SCHEDULE G-8

Special Services: Meter Setting On Site

Description	Fees
Meter Company Adjustments:	$ 5
All Other Meter Settings:	
First Meter	
By Appointment	7
Unscheduled Request	12
Additional Meters	3.50 each

APPENDIX I

SCHEDULE G-9

Special Services: Money Orders

Amount	Fee
$ 0.01 to $ 10	$ 0.55
10.01 to 50	0.80
50.01 to 400	1.10
APO-FPO	
$ 0.01 to $400	$ 0.20

SCHEDULE G-10

Special Services: Parcel Air Lift

Description	Fees (in addition to parcel postage)
Up to 2 pounds	$ 0.25
Over 2 up to 3 pounds	0.50
Over 3 up to 4 pounds	0.75
Over 4 pounds	1.00

SCHEDULE G-11

Special Services: Permit Imprints

Description	Fee
Per permit	$30

APPENDIX I

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SCHEDULE G-12

Special Services: Registered Mail

Value	Fees (in addition to postage) For Articles Not Covered By Commercial Or Other Insurance	Fees (in addition to postage) For Articles Also Covered By Commercial Or Other Insurance
$ 0.00 to $ 100	$ 3.00	$ 3.00
$ 100.01 to $ 200	3.30	3.30
$ 200.01 to $ 400	3.70	3.70
$ 400.01 to $ 600	4.10	4.10
$ 600.01 to $ 800	4.50	4.50
$ 800.01 to $ 1,000	4.90	4.90
$ 1,000.01 to $ 2,000	5.30	$4.90 plus handling charge of 35 cents per $1,000 or fraction over first $1,000
$ 2,000.01 to $ 3,000	5.70	
$ 3,000.01 to $ 4,000	6.10	
$ 4,000.01 to $ 5,000	6.50	
$ 5,000.01 to $ 6,000	6.90	
$ 6,000.01 to $ 7,000	7.30	
$ 7,000.01 to $ 8,000	7.70	
$ 8,000.01 to $ 9,000	8.10	
$ 9,000.01 to $10,000	8.50	
$10,000.01 to $11,000	8.90	
$11,000.01 to $12,000	9.30	
$12,000.01 to $13,000	9.70	
$13,000.01 to $14,000	10.10	
$14,000.01 to $15,000	10.50	
$15,000.01 to $16,000	10.90	
$16,000.01 to $17,000	11.30	
$17,000.01 to $18,000	11.70	
$18,000.01 to $19,000	12.10	
$19,000.01 to $20,000	12.50	
$20,000.01 to $21,000	12.90	
$21,000.01 to $22,000	13.30	
$22,000.01 to $23,000	13.70	
$23,000.01 to $24,000	14.10	
$24,000.01 to $25,000	14.50	
$25,000 to $1,000,000 Proposed	$14.50 plus handling charge of $0.35 cents per $1,000 or fraction over first $25,000.	
$1,000,000 to $15,000,000	$355.75 plus handling charge of 30 cents per $1,000 or fraction over first $1,000,000	$354.55 plus handling charge of 30 cents per 1,000 or fraction over first $1,000,000
Over $15,000,000	Additional charges may be made based on considerations of weight, space and value.	

APPENDIX I

SCHEDULE C-13

Special Services: Restricted Delivery

Description	Fee (in addition to postage)
Per-piece	$ 0. 80

APPENDIX I

SCHEDULE G-14

Special Services: Return Receipts

Description	Fees (in addition to postage)
Requested at time of Mailing	
Showing to whom (signature) and date delivered	$ 0.45
Showing to whom (signature), date and address where delivered	0.55
Requested after Mailing	
Showing to whom and date delivered	2.10

APPENDIX I

SCHEDULE G-15

Special Services: Second-Class Applications

Type	Fees
Original Entry	$120
News Agents	30
Re-entry	30
Additional Entry (all zones)	50

APPENDIX I

SCHEDULE G-16

Special Services: Special Delivery

Class/Weight	Fees (in addition to postage)
First-Class and Priority Mail	
Not more than 2 pounds	$ 2.00
Over 2 but not over 10 pounds	2.25
Over 10 pounds	2.85
All Other Classes	
Not more than 2 pounds	2.25
Over 2 but not over 10 pounds	2.85
Over 10 pounds	3.25

SCHEDULE G-17

Special Services: Special Handling

Weight	Fees (in addition to postage)
Not more than 10 pounds	$ 0.70
Over 10 pounds	1.25

APPENDIX I

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SCHEDULE G-18

Special Services: Stamped Envelopes

Type	Price
Single Sale	$0.03
Bulk (500) #6-3/4 size	
Regular	4.50
Window	5.00
Precanceled	4.50
Bulk (500) #10 size	
Regular	5.50
Window	6.00
Precanceled	5.50
Printing Charge Per 500 Envelopes	
Minimum Order (500 Envelopes)	2.50
Orders for 1,000 or more Envelopes	2.50

SCHEDULE G-19

Special Services: Zip Coding of Mailing Lists

Description	Fee
Per thousand addresses	$23

APPENDIX II

SCHEDULE 1

Second-Class Phased Rates: In-County

Rate Category	Phased Rates (cents)										
	Year										
	6	7	8	9	10	11	12	13	14	15	16
Pound-Rate Matter:											
Per Pound	2.1	2.5	2.8	3.1	3.4	3.8	4.1	4.4	4.7	5.1	5.4
Per piece	0.8	1.1	1.3	1.6	1.8	2.1	2.4	2.6	2.9	3.1	3.4

SCHEDULE 2

Second-Class Phased Rates: Publications of Authorized Nonprofit Organizations, Outside County

Rate Category	Phased Rates (cents)										
	Year										
	6	7	8	9	10	11	12	13	14	15	16
Per Pound											
Non-advertising portion	4.4	5.0	5.7	6.4	7.1	7.8	8.5	9.1	9.8	10.5	11.2
Advertising Portion											
Zones 1 & 2	6.9	7.8	8.7	9.6	10.5	11.4	12.2	13.1	14.0	14.9	15.8
3	7.6	8.5	9.4	10.3	11.2	12.1	13.0	13.8	14.7	15.6	16.5
4	9.1	9.9	10.8	11.6	12.5	13.3	14.2	15.0	15.9	16.7	17.6
5	10.8	11.6	12.5	13.4	14.3	15.2	16.1	17.0	17.9	18.8	19.7
6	12.0	13.1	14.1	15.2	16.2	17.3	18.3	19.4	20.4	21.5	22.5
7	13.0	14.2	15.4	16.6	17.8	19.0	20.2	21.5	22.7	23.9	25.1
8	13.9	15.3	16.6	18.0	19.4	20.8	22.1	23.5	24.9	26.2	27.6
Per-Piece	1.3	1.7	2.1	2.6	3.0	3.4	3.9	4.3	4.7	5.2	5.6

SCHEDULE 3

Second-Class Phased Rates: Classroom Publications, Outside County

Rate Category	Phased Rates (cents)										
	Year										
	6	7	8	9	10	11	12	13	14	15	16
Per-Pound											
Non-advertising portion	3.3	3.5	3.7	3.9	4.1	4.3	4.5	4.8	5.0	5.2	5.4
Advertising Portion											
Zones 1 & 2	4.3	4.6	4.9	5.2	5.4	5.7	6.0	6.3	6.6	6.9	7.2
3	5.0	5.2	5.5	5.8	6.0	6.3	6.5	6.8	7.1	7.3	7.6
4	6.2	6.4	6.7	7.0	7.3	7.5	7.8	8.1	8.4	8.6	8.9
5	8.0	8.3	8.6	9.0	9.3	9.6	9.9	10.2	10.6	10.9	11.2
6	10.0	10.4	10.8	11.3	11.7	12.1	12.5	12.9	13.4	13.8	14.2
7	11.4	11.9	12.5	13.1	13.6	14.2	14.7	15.3	15.9	16.4	17.0
8	13.1	13.7	14.3	14.9	15.4	16.0	16.6	17.2	17.7	18.3	18.9
Per-Piece	0.8	1.1	1.3	1.5	1.7	1.9	2.1	2.4	2.6	2.8	3.0

SCHEDULE 4

Second-Class Phased Rates: Regular Rate Publications, Outside County

Rate Category	Phased Rates (Cents)										
	Year										
	6	7	8	9	10	11	12	13	14	15	16
Per Pound											
Non-advertising portion	9.0	11.0	13.1								
Advertising Portion											
Zones 1 & 2	12.0	14.7	17.5								
1 & 2*	7.0	7.9	8.7	9.6	10.5	11.4	12.3	13.2	14.0	14.9	15.8
3	12.9	15.6	18.4								
4	14.4	17.1	19.9								
5	16.6	19.7	22.7								
6	19.1	22.6	26.0								
7	21.4	25.4	29.4								
8	23.7	27.8	31.8								
Per-Piece**	3.7	5.4	7.0								
Per-Piece***	3.2	4.3	5.4								
Per-Piece****	2.8	3.6	4.4								
Per-Piece*****	1.2	1.6	2.1	2.6	3.1	3.5	4.0	4.5	5.0	5.4	5.9
Per-Piece******	1.0	1.3	1.7	2.0	2.3	2.7	3.0	3.3	3.6	4.0	4.3

*Science of Agriculture publications.

**Publications mailing 5,000 or more copies per issue outside county of publication, Category A: Outgoing/incoming distribution required (SCF, states, and mixed states).

***Publications mailing 5,000 or more copies per issue outside county of publication, Category B: Incoming distribution only required (3-digit city and 5-digit).

****Publications mailing 5,000 or more copies per issue outside county of publication, Category C: By-pass outgoing and incoming distribution (carrier route or finer).

*****Publications mailing fewer than 5,000 copies per issue outside county of publication not presorted to 3-digit city/5 digit.

******Publications mailing fewer than 5,000 copies per issue outside county of publication presorted to 3-digit city/5 digit.

SCHEDULE 5

Controlled Circulation Phased Rates

Rate Category	Phased Rates (cents)		
	Year		
	6	7	8
Per-Pound	12.3	13.8	15.3
Per-Piece	4.1	4.9	5.8

SCHEDULE 6

Third-Class Phased Rates: Nonprofit Bulk

Rate Category	Phased Rates (cents)										
	Year										
	6	7	8	9	10	11	12	13	14	15	16
Per-Pound											
Ordinary Matter	15.0	17.0	19.0	20.0	22.0	24.0	26.0	28.0	30.0	32.0	34.0
Books, Catalogs, Etc.	12.0	14.0	16.0	17.0	19.0	21.0	22.0	24.0	26.0	27.0	29.0
Minimum-Per-Piece	2.4	2.7	3.1	3.5	3.9	4.2	4.6	5.0	5.4	5.7	6.1

SCHEDULE 7

Fourth-Class Phased Rates: Special and Library

Rate Category	Phased Rates (cents)										
	Year										
	6	7	8	9	10	11	12	13	14	15	16
Special:											
First Pound, Regular Rate	36.0	48.0	59.0								
First Pound, Discount Level A	33.3	42.6	52.0								
First Pound, Discount Level B	34.4	44.7	55.0								
Each Additional Pound Thru 7 Pounds	14.0	18.0	22.0								
Each Additional Pound	10.0	11.0	13.0								
Library:											
First Pound	11.0	14.0	17.0	19.0	22.0	25.0	27.0	30.0	33.0	35.0	38.0
Each Additional Pound Thru 7 Pounds	5.0	5.0	6.0	7.0	8.0	9.0	10.0	10.0	11.0	12.0	13.0
Each Additional Pound	4.0	4.0	5.0	5.0	5.0	6.0	6.0	6.0	6.0	7.0	7.0

DECISION OF THE GOVERNORS OF THE UNITED STATES POSTAL SERVICE ON CHANGES IN THE DOMESTIC MAIL CLASSIFICATION SCHEDULE RE CITIZENS' RATE MAIL

May 19, 1978

Pursuant to the provisions of the Postal Reorganization Act, the Governors of the United States Postal Service hereby approve the Postal Rate Commission's Recommended Decision on the changes proposed for the Domestic Mail Classification Schedule which would establish a subclass of first-class mail for citizens' rate mail - that is, a deferrable service for mail sent by individuals. In its Recommended Decision transmitted to the Governors on May 12, 1978, the Commission declined to recommend the proposed changes to us for approval. We approve, but with reservations on part of the Commission's analysis of the matter.

Statement of Explanation and Justification

At its meeting of July 11, 1977, the Board of Governors authorized the Postal Service to request a recommended decision on a change in the Classification Schedule which would lead to the adoption of a new subclass for citizens' rate mail, along with appropriate rates of postage therefor. Citizens' rate mail would involve a deferrable - although perhaps not often deferred - service for mail sent by individuals, with certain other features that are not material to our decision today. When, as members of the Board of Governors, we concurred in authorizing the Postal Service to

request a recommended decision on this matter, we did so after being advised by postal management that the President had stated that he believed that it would be in the public interest to pursue the concept of a citizens' rate for the use of consumers, and had suggested that the Postal Service consider whether this idea was feasible and consistent with the intent of postal reorganization, including efforts to control costs. As reported in the minutes of the Board meeting of July 6, 1977, we were advised that postal management believed that the idea was indeed feasible. Against this background, the various and sometimes conflicting opinions of the Rate Commissioners which have now been reported simply do not add up, in our view, to a fully acceptable analysis.

The Commission recommends a decision that the proposed classification change is not in accordance with the policy of the Postal Reorganization Act, including 39 U.S.C. §403(c), nor with the criteria of 39 U.S.C. §3623(c), and that the associated proposed rates would not be in accord with 39 U.S.C. §3622(b)(3). But a reasonably close reading of the opinion of the Commission suggests that the Commission's recommended decision on this point is more narrow than might first appear and that it boils down to a recommendation that (1) the record does not support a finding that "individuals" is a proper grouping for classification purposes, and, therefore, the proposal violates §403(c), and (2) the proposed rates for citizens' rate mail do not meet the requirements of section 3622(b)(3). The members of the Commission are evenly divided on whether service differences are sufficient to distinguish citizens' rate mail from regular first-class mail.

Because the deferrable feature of the proposed citizens' rate mail distinguishes it from regular first-class mail, as to

both its speed and its reliability (39 U.S.C. §3623(c)(4)), and because the adverse views on the service distinction focus on speed of service, with little attention to its lesser degree of reliability, we may turn to the majority's conclusion that a subclass for use only by individuals is unjustified.[1]

One line of analysis on this point is that the values identified in 39 U.S.C. §101 warrant the conclusion that correspondence by the nation's expanding populace should be encouraged, and that by establishing a lower-rated subclass for use by individuals, this objective might be advanced. The Commission's Chairman adopts this view in his concurring opinion, but concludes that the record is insufficient to justify a finding that a lower rated service would foster such correspondence. Although the principal opinion concludes (at page 200) that 39 U.S.C. §101 "accords no special status to personal correspondence over other forms of mail communication," section 101 in our view is certainly hospitable to the thought that a distinction may be drawn between business originated mail and mail sent by individuals. The question is not so much whether there is a "special status" for the personal correspondence of the latter, but whether the principal distinction might properly be drawn, for classification purposes. In this regard, we note

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[1]A majority of the Commission's members would tend to draw adverse inferences from Postal Service evidence that a 16 cent rate for first-class mail is justified on consideration of the criteria of 39 U.S.C. §3622. The evidence was based on an hypothesis that no citizens' rate subclass would exist during the relevant test year. The Commission's rules regarding classification changes require submission of data on a "with" and "without" the subclass basis. 39 C.F.R. §3001.64(c). If it is permissible to draw adverse inferences from the data that show the circumstances that would exist without the change, the only classification changes likely to survive are those that avert impending disaster. With other changes, as here, the data would show simply an improvement in a system that presently meets the relevant statutory criteria.

that the proposed subclass would not be limited to personal correspondence from individuals.

The remainder of the issues that attend the proposal concern the uncertainties in the subclass's volume, revenue, and effect on postal operations that emerge from the present record. As stated in the principal opinion the "objection lies with the extreme range of those uncertainties and the failure of the evidence to provide a reasonable measure of their limitations . . ." Opinion at 219.

Although we find the Commission's Recommended Decision less than wholly persuasive, especially in regard to the points that we have identified in the foregoing, the fact remains that the Commission has spoken and that it has not provided a great deal of ground on which to base a belief that returning this matter to the Commission will serve any practical purpose in the near future.

ORDER

In accordance with 39 U.S.C. §3625, the Recommended Decision of the Postal Rate Commission is hereby approved.

BY THE GOVERNORS:

/s/ M. A. WRIGHT

Chairman

APPENDIX C

STATUTE INVOLVED

The Postal Reorganization Act,
August 12, 1970, as amended
(84 Stat. 719, et seq.; 39 U.S.C. 101, et seq.)

§101
§201
§401
§403
§§3601-3685 (Chapter 36)

APPENDIX C

STATUTE INVOLVED

The Postal Reorganization Act, 84 Stat. 719, *et seq.*, as amended, 39 U.S.C. 101, *et seq.*, provides in pertinent part:

§ 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Servce shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer. the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transporta-

tion to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

* * * * * * *

§ 201. United States Postal Service

There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

* * * * * * *

§ 401. General Powers of the Postal Service

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

§ 403. General duties

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. Except as provided in the Canal Zone Code, the Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service—

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

* * * * * * *

CHAPTER 36.—POSTAL RATES, CLASSES, AND SERVICES

SUBCHAPTER I—POSTAL RATE COMMISSION

SEC.
3601. Establishment.
3602. Terms of office.
3603. Rules; regulations; procedures.
3604. Administration.

SUBCHAPTER II—PERMANENT RATES AND CLASSES OF MAIL

3621. Authority to fix rates and classes.
3622. Rates and fees.
3623. Mail classification.
3624. Recommended decisions of Commission.
3625. Action of the Governors.
3626. Reduced rates.
3627. Adjusting free and reduced rates.
3628. Appellate review.

SUBCHAPTER III—TEMPORARY RATES AND CLASSES

3641. Temporary changes in rates and classes.

SUBCHAPTER IV—POSTAL SERVICES AND COMPLAINTS

3661. Postal services.
3662. Rate and service complaints.

SUBCHAPTER V—GENERAL

3681. Reimbursement.
3682. Size and weight limits.
3683. Uniform rates for books; films; other materials.
3684. Limitations.
3685. Filing of information relating to periodical publications.

SUBCHAPTER I—POSTAL RATE COMMISSION

§ 3601. Establishment

(a) The Postal Rate Commission is an independent establishment of the executive branch of the Government of the United States. The Commission is composed of 5 Commissioners, appointed by the President, by and with the advice and consent of the Senate. The Commissioners shall be chosen on the basis of their professional qualifications and may be removed by the President only for cause. Not more than 3 of the Commissioners may be adherents of the same political party.

(b) A Commissioner may continue to serve after the expiration of his term until his successor has qualified, except that a Commissioner may not so continue to serve for more than 1 year after the date upon which his term otherwise would expire under section 3602 of this title.

(c) One of the Commissioners shall be designated as Chairman by, and shall serve in the position of Chairman at the pleasure of, the President.

(d) The Commissioners shall by majority vote designate a Vice Chairman of the Commission. The Vice Chairman shall act as Chairman of the Commission in the absence of the Chairman.

(Amended Pub. L. 94–421, § 3, Sept. 24, 1976, 90 Stat. 1304.)

§ 3602. Terms of office

The Commissioners of the Postal Rate Commission shall serve for terms of 6 years except that—

(1) the terms of the Commissioners first taking office shall expire as designated by the President at the time of appointment, 1 at the end of 2 years, 2 at the end of 4 years, and 2 at the end of 6 years, following the appointment of the first of them; and

(2) any Commissioner appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed shall serve for the remainder of such term.

§ 3603. Rules; regulations; procedures

The Postal Rate Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this chapter. Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service.

§ 3604. Administration

(a) The Chairman of the Postal Rate Commission shall be the

principal executive officer of the Commission. The Chairman shall exercise or direct the exercise of all the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment of personnel employed under the Commission, except that the appointment of heads of major administrative units under the Commission shall require the approval of a majority of the members of the Commission, (2) the supervision of the personnel employed under the Commission and the distribution of business among them and among the Commissioners, and (3) the use and expenditure of funds.

(b) In carrying out any of his functions under this section, the Chairman shall be governed by the general policies of the Commission.

(c) The Chairman may obtain such facilities and supplies as may be necessary to permit the Commission to carry out its functions. Any officer or employee appointed under this section shall be paid at rates of compensation and shall be entitled to programs offering employee benefits established under chapter 10 or chapter 12 of this title, as appropriate.

(d)(1) The Commission shall periodically prepare and submit to the Postal Service a budget of the Commission's expenses, including, but not limited to, expenses for facilities, supplies, compensation, and employee benefits. The budget shall be considered approved—

(A) as submitted if the Governors fail to act in accordance with subparagraph (B) of this paragraph: or

(B) as adjusted if the Governors holding office, by unanimous written decision, adjust the total amount of money requested in the budget.

Subparagraph (B) shall not be construed to authorize the Governors to adjust any item included within the budget.

(2) Expenses incurred under any budget approved under paragraph (1) of this subsection shall be paid out of the Postal Service fund established under section 2003 of this title.

(e) The provisions of section 410 and chapter 10 of this title shall apply to the Commission, as appropriate. (Amended Pub. L. 94–421, § 4. Sept. 24, 1976, 90 Stat. 1305.)

SUBCHAPTER II—PERMANENT RATES AND CLASSES OF MAIL

§ 3621. Authority to fix rates and classes

Except as otherwise provided, the Governors are authorized to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of this chapter. Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service under honest, efficient, and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. Postal rates and fees shall provide

sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

§ 3622. Rates and fees

(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

(Amended Pub. L. 94–421, § 10, Sept. 24, 1976, 90 Stat. 1311.)

§ 3623. Mail classification

(a) Within 2 years after the effective date of this subchapter, the Postal Service shall request the Postal Rate Commission to make a recommended decision on establishing a mail classification schedule in accordance with the provisions of this section.

(b) Following the establishment of the mail classification schedule requested under subsection (a) of this section, the Postal Service may from time to time request that the Commission submit, or the Commission may submit to the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.

(c) The Commission shall make a recommended decision on establishing or changing the schedule in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable classification system for all mail;

(2) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;

(3) the importance of providing classifications with extremely high degrees of reliability and speed of delivery;

(4) the importance of providing classifications which do not require an extremely high degree of reliability and speed of delivery;

(5) the desirability of special classifications from the point of view of both the user and of the Postal Service; and

(6) such other factors as the Commission may deem appropriate.

(d) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee. (Amended Pub. L. 94–421, § 8, Sept. 24, 1976, 90 Stat. 1310.)

§ 3624. Recommended decisions of Commission

(a) The Postal Rate Commission shall promptly consider a request made under section 3622 or 3623 of this title, except that the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission who shall be required to represent the interests of the general public.

(b) In order to conduct its proceedings with utmost expedition consistent with procedural fairness to the parties, the Commission may

(without limitation) adopt rules which provide for—

(1) the advance submission of written direct testimony;

(2) the conduct of prehearing conferences to define issues, and for other purposes to insure orderly and expeditious proceedings;

(3) discovery both from the Postal Service and the parties to the proceedings;

(4) limitation of testimony; and

(5) the conduct of the entire proceedings off the record with the consent of the parties.

(c)(1) Except as provided by paragraph (2) of this subsection, in any case in which the Postal Service makes a request under section 3622 of this title for a recommended decision by the Commission on changes in a rate or rates of postage or in a fee or fees for postal services the Commission shall transmit its recommended decision to the Governors under subsection (d) of this section no later than 10 months after receiving any such request from the Postal Service.

(2) In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this subsection by one day for each day of such delay.

(d) The Commission shall transmit its recommended decision in a rate, fee, or classification matter to the Governors. The recommended decision shall include a statement specifically responsive to the criteria established under section 3622 or 3623, as the case may be. (Amended Pub. L. 94–421, § 5(a), Sept. 24, 1976, 90 Stat. 1306.)

§ 3625. Action of the Governors

(a) Upon receiving a recommended decision from the Postal Rate Commission, the Governors my approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section.

(b) The Governors may approve the recommended decision and order the decision placed in effect.

(c) The Governors may, under protest, allow a recommended decision of the Commission to take effect and (1) seek judicial review thereof under section 3628 of this title, or (2) return the recommended decision to the Commission for reconsideration and a further recommended decision, which shall be acted upon under this section and subject to review in accordance with section 3628 of this title.

(d) The Governors may reject the recommended decision of the Commission and the Postal Service may resubmit its request to the Commission for reconsideration. Upon resubmission, the request shall be reconsidered, and a further recommended decision of the Commission shall be acted upon under this section and subject to review in accordance with section 3268 of this title. However, with the unanimous written concurrence of all of the Governors then holding office, the Governors may modify any such further recommended decision of

the Commission under this subsection if the Governors expressly find that (1) such modification is in accord with the record and the policies of this chapter, and (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations will equal as nearly as practicable estimated total costs.

(e) The decision of the Governors to approve, allow under protest, reject, or modify a recommended decision of the Commission shall be in writing and shall include an estimate of anticipated revenue and a statement of explanation and justification. The decision, the record of the Commission's hearings, and the Commission's recommended decision shall be made generally available at the time the decision is issued and shall be printed and made available for sale by the Public Printer within 10 days following the day the decision is issued.

(f) The Board shall determine the date on which the new rates, fees, the mail classification schedule, and changes in such schedule under this subchapter shall become effective.

§ 3626. Reduced rates

(a) If the rates of postage for any class of mail or kind of mailer under former sections 4358, 4359, 4421, 4422, 4452, or 4554 of this title, as such rates existed on the effective date of this subchapter, are, on the effective date of the first rate decision under this subchapter affecting that class or kind, less than the rates established by such decision, a separate rate schedule shall be adopted for that class or kind effective each time rates are established or changed under this subchapter, with annual increases as nearly equal as practical, so that—

(1) the revenues received from rates for mail under former sections 4358, 4452 (b) and (c), and 4554 (b) and (c) shall not, on and after the first day of the sixteenth year following the effective date of the first rate decision applicable to that class or kind, exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service);

(2) the rates for mail under former sections 4359, 4421, 4422, and 4554(a) shall be equal, on and after the first day of the eighth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subsection had not been enacted; and

(3) the rates for mail under former section 4452(a) shall be equal, on and after the first day of the fifth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subparagraph had not been enacted.

No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subparagraph unless he files annually with the Postal Service a written request for permission to mail matter at such rates.

(b)(1) For the purposes of this title, the term "periodical publications", as used in former section 4351 of this title, includes (A) any catalog or other course listing, including mail announcements of legal texts which are part of post-bar admission education issued by any institution of higher education or by a nonprofit organization engaged in continuing legal education; and (B) any looseleaf page or report (including any index, instruction for filing, table, or sectional identifier which is an integral part of such report) which is designed as part of a looseleaf reporting service concerning developments in the law or public policy.

(2) Any material described in paragraph (1) of this subsection shall qualify to be entered and mailed as second class mail in accordance with the applicable provisions of former section 4352 through former section 4357 of this title.

(3) For purposes of this subsection, the term "institution of higher education" has the meaning given it by section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)).

(c) In the administration of this section, one conservation publication published by an agency of a State which is responsible for management and conservation of the fish or wildlife resources of such State shall be considered a publication of a qualified nonprofit organization which qualifies for rates of postage under former section 4358(d) of this title.

(d)(1) For purposes of this title, the term "agricultural", as used in former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, includes the art or science of cultivating land, harvesting crops or marine resources, or raising of livestock.

(2) In the administration of this section, and for purposes of former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, agricultural organizations or associations shall include any organization or association which collects and disseminates information or materials relating to agricultural pursuits.

(Amended Pub. L. 93–28, § 1, June 30, 1974, 88 Stat. 287; Pub. L. 94–421, § 11, Sept. 24, 1976, 90 Stat. 1311.)

§ 3627. Adjusting free and reduced rates

If Congress fails to appropriate an amount authorized under section 2401(c) of this title for any class of mail sent at a free or reduced rate under section 3217, 3403–3405, or 3626 of this title, or under the Federal Voting Assistance Act of 1955, the rate for that class may be adjusted in accordance with the provisions of this subchapter so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate.

§ 3628. Appellate review

A decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission may be appealed to any court of appeals of the United States, within 15 days after its publication by the Public Printer, by an aggrieved

party who appeared in the proceedings under section 3624(a) of this title. The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Commission and the Governors. The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. The court shall make the matter a preferred cause and shall expedite judgment in every way. The court may not suspend the effectiveness of the changes, or otherwise prevent them from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a decision made by the Commission or Governors under this chapter except as provided in this section.

SUBCHAPTER III—TEMPORARY RATES AND CLASSES

§ 3641. Temporary changes in rates and classes

(a) In any case in which the Postal Rate Commission fails to transmit a recommended decision on a change in rates of postage or in fees for postal services to the Governors in accordance with section 3624(c) of this title, the Postal Service may establish temporary changes in rates of postage and in fees for postal services in accordance with the proposed changes under consideration by the Commission. Such temporary changes may take effect upon such date as the Postal Service may determine, except that such temporary changes may take effect only after 10 days' notice in the Federal Register.

(b) Any temporary rate or fee established by the Postal Service under subsection (a) of this section shall be in accordance with the policies of this title and shall not exceed such amount as may be necessary for sufficient revenues to assure that the total estimated income, including appropriations, of the Postal Service shall, to the extent practicable, be equal to the total estimated costs of the Postal Service.

(c) Notwithstanding the provisions of subsection (b) of this section, the Postal Service may not establish any temporary rate for a class of mail or any temporary fee for a postal service which is more than the permanent rate or fee requested for such class or postal service by the Postal Service under section 3622 of this title.

(d) Any temporary change in rates of postage or in fees for postal services made by the Postal Service under this section shall remain in effect no longer than 150 days after the date on which the Commission transmits its recommended decision to the Governors under section 3624(d) of this title, unless such temporary change is terminated by the Governors before the expiration of such period.

(e) If the Postal Rate Commission does not transmit to the Governors within 90 days after the Postal Service has submitted, or within 30 days after the Postal Service has resubmitted, to the Commission a request for a recommended decision on a change in the mail classification schedule (after such schedule is established under section

3623 of this title), the Postal Service, upon 10 days' notice in the Federal Register, may place into effect temporary changes in the mail classification schedule in accordance with proposed changes under consideration by the Commission. Any temporary change shall be effective for a period ending not later than 30 days after the Commission has transmitted its recommended decision to the Governors.

(f) If, under section 3628 of this title, a court orders a matter returned to the Commission for further consideration, the Postal Service, with the consent of the Commission, may place into effect temporary changes in rates of postage, and fees for postal services, or in the mail classification schedule. (Amended Pub. L. 94–421, § 6(a), Sept. 24, 1976, 90 Stat. 1306.)

SUBCHAPTER IV—POSTAL SERVICES AND COMPLAINTS

§ 3661. Postal services

(a) The Postal Service shall develop and promote adequate and efficient postal services.

(b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Rate Commission requesting an advisory opinion on the change.

(c) The Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.

§ 3662. Rate and service complaints

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe. The Commission may in its discretion hold hearings on such complaint. If the Commission, in a matter covered by subchapter II of this chapter, determines the complaint to be justified, it shall, after proceedings in conformity with section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628 of this title. If a matter not covered by subchapter II of this chapter is involved, and the Commission after hearings finds the complaint to be justified, it shall render a public report

thereon to the Postal Service which shall take such action as it deems appropriate.

SUBCHAPTER V—GENERAL

§ 3681. Reimbursement

No mailer may be reimbursed for any amount paid under any rate or fee which, after such payment, is determined to have been unlawful after proceedings in accordance with the provisions of section 3628 of this title, or is superseded by a lower rate or fee established under subchapter II of this chapter.

§ 3682. Size and weight limits

(a) Except as provided in subsection (b) of this section—

(1) the maximum weight of mail other than letter mail is 40 pounds; and

(2) the maximum size is—

(A) 78 inches in girth and length combined before July 1, 1971; and

(B) 84 inches in girth and length combined on and after July 1, 1971.

(b) The maximum size on mail, other than letter mail, is 100 inches in girth and length combined, and the maximum weight is 70 pounds if the mail—

(1) is mailed at, or addressed for delivery at, other than first-class post offices or on rural or star routes, as such offices and routes existed on the day prior to the effective date of this section, as determined by the Postal Service;

(2) contains baby fowl, live plants, trees, shrubs, or agricultural commodities but not the manufactured products of those commodities;

(3) would have been entitled to be mailed under former section 4554 of this title;

(4) is addressed to or mailed at any Armed Forces post office outside the 50 States; or

(5) is addressed to or mailed in the Commonwealth of Puerto Rico, the States of Alaska and Hawaii, or a possession of the United States including the Canal Zone and the Trust Territory of the Pacific Islands.

(c) The Postal Service may establish size and weight limitations for letter mail in the same manner as prescribed for changes in classification under subchapter II of this chapter.

§ 3683. Uniform rates for books; films; other materials

(a) Notwithstanding any other provision of this title, the rates of postage established for mail matter enumerated in former section 4554 of this title shall be uniform for such mail of the same weight, and shall not vary with the distance transported.

(b) The rates for mail matter specified in former section 4554(a)(1) or 4554(b)(2)(A) of this title, when mailed from a publisher or a distributor to a school, college, university, or library, shall be the rate currently in effect for such mail matter under the provisions of former section 4554(b)(1) of this title. (Amended Pub. L. 94–421, § 12, Sept. 24, 1976, 90 Stat. 1312.)

§ 3684. Limitations

Except as provided in section 3627 of this title, no provision of this chapter shall be construed to give authority to the Governors to make any change in any provision of section 3682 or 3683 or chapter 30, 32, or 34 of this title, or of the Federal Voting Assistance Act of 1955.

§ 3685. Filing of information relating to periodical publications

(a) Each owner of a publication having periodical publication mail privileges shall furnish to the Postal Service at least once a year, and shall publish in such publication once a year, information in such form and detail and at such time as the Postal Service may require with respect to—

(1) the identity of the editor, managing editor, publishers, and owners;

(2) the identity of the corporation and stockholders thereof, if the publication is owned by a corporation;

(3) the identity of known bondholders, mortgagees, and other security holders;

(4) the extent and nature of the circulation of the publication, including, but not limited to, the number of copies distributed, the methods of distribution, and the extent to which such circulation is paid in whole or in part; and

(5) such other information as the Postal Service may deem necessary to determine whether the publication meets the standards for periodical publication mail privileges.

The Postal Service shall not require the names of persons owning less than 1 percent of the total amount of stocks, bonds, mortgages, or other securities.

(b) Each publication having such mail privileges shall furnish to the Postal Service information in such form and detail, and at such times, as the Postal Service requires to determine whether the publication continues to qualify for such privileges.

(c) The Postal Service shall make appropriate rules and regulations to carry out the purposes of this section, including provision for suspension or revocation of periodical publication mail privileges for failure to furnish the required information.

APPENDIX D

Opinions of the United States Court of Appeals for the District of Columbia Circuit

No. 75-1856, *et al.*

National Association of Greeting Card Publishers, et al. v. *United States Postal Service*, *569 F.2d 570* (NAGCP I)

December 28, 1976

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1856

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, APPELLANT

v.

THE UNITED STATES POSTAL SERVICE, APPELLEE

UNITED PARCEL SERVICE OF AMERICA, INC., AMERICAN BUSINESS PRESS, INC., ET AL., ASSOCIATED THIRD CLASS MAIL USERS, INTERVENORS

Notice of Appeal from an Order of the U.S. Postal Service

No. 75-1857

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

UNITED PARCEL SERVICE OF AMERICA, INC., AMERICAN BUSINESS PRESS, INC., ET AL.

ASSOCIATION OF AMERICAN PUBLISHERS, INC. PARCEL POST ASSOCIATION, INTERVENORS

Petition for Review of an Order of the U.S. Postal Service

No. 75-2227 & 75-2228

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE, APPELLANT

POSTAL RATE COMMISSION, ET AL.

(D.C. Civil Action 75-1809)

No. 75-2238

STATE OF MAINE, ET AL., APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

(Civil Action 75-1782)

Appeals from the United States District Court for the District of Columbia

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Argued February 20, 1976

Decided December 28, 1976

Judgment entered this date

Matthew S. Perlman, with whom *Douglas G. Green* was on the brief for appellant in No. 75-1856 and petitioner in No. 75-1857.

James R. Adams, Assistant Attorney General of the Commonwealth of Massachusetts, with whom *Francis X. Bellotti*, Attorney General of the Commonwealth of Massachusetts, was on the brief for appellants in No. 75-2238, also filed a brief as *amici curiae* in Nos. 75-1856 and 75-1857.

James H. Finch, Jr., Associate General Counsel, U.S. Postal Service, and *Ronald R. Glancz*, Attorney, Civil Division, Appellate Section U.S. Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Louis A. Cox*, General Counsel, U.S. Postal Service, *Earl J. Silbert*, United States Attorney, and *John L. DeWeerdt*, Attorney, U.S. Postal Service and *Paul M. Tschirhart*, Assistant U.S. Attorney, were on the brief for appellee in Nos. 75-1856 and 75-2238 and respondent in 75-1857. *Neil H. Koslowe*, Attorney, Civil Division, Appellate Section, Department of Justice, was on the brief for appellants in 75-2227 and 75-2228. *Donald J. Engleman*, Attorney, U.S. Postal Service, and *Thomas G. Wilson*, Attorney, Department of Justice, entered appearances for appellee in No. 75-1856 and respondent in No. 75-1857. *Eugene R. Sullivan*, Attorney, Department of Justice, and *Paul M. Tschirhart*, Assistant United States Attorney, also entered appearances for appellants in 75-2227 and 75-2228.

J. Edward Day, with whom *William F. Taylor* was on the brief, for appellee, Associated Third Class Mail Users. *William D. Kramer* also entered an appearance for appellee, Associated Third Class Mail Users. *J. Edward Day* entered an appearance for Associated Third Class Mail Users in 75-1856.

Nicholas S. McConnell, with whom *Kenneth Wells Parkinson* was on the brief, for appellee National Easter Seal Society for Crippled Children and Adults.

David M. Kendall, First Assistant Attorney General for the State of Texas and *William C. Bednar, Jr.*, Assistant Attorney General of the State of Texas, were on the brief for appellant in No. 75-2238.

Bernard G. Segal, Robert L. Kendall, Jr., and *Frederick C. Belen* were on the brief for intervenor, United Parcel Service of America, Inc.

Robert A. Saltzstein and *William L. Fallon* were on the brief for intervenor, American Business Press, Inc.

William G. Mullen was on the brief for intervenor National Newspaper Association.

Richard M. Schmidt, Jr., and *Ian D. Volner* entered appearances for intervenor, Association of American Publishers.

Daniel B. Jordan filed a brief on behalf of American Postal Workers as *amicus curiae* urging affirmance in 75-2227 and 75-2228.

David C. Todd entered an appearance for intervenor Parcel Post Association.

Before: BAZELON, *Chief Judge*, ROBINSON and MACKINNON, *Circuit Judges*

Opinion PER CURIAM.

Concurring Opinion filed by *Circuit Judge* MACKINNON.

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PER CURIAM: These three cases, consolidated for consideration on the merits, raise a full range of substantive and procedural challenges to a series of orders of the United States Postal Service ("Postal Service" or "USPS") issued pursuant to the Postal Reorganization Act of 1970 ("Act"), 39 U.S.C. § 101 *et seq.*, for the purpose of implementing certain increases in postal rates and fees, either temporarily or on a permanent basis.[1] In Nos. 75-1856, 75-1857—the National Association of Greeting Card Publishers ("NAGCP") case—we review the permanent rates that were in effect from September to December, 1975. In Nos. 75-2227, 75-2228 and No. 75-2238—the Associated Third Class Mail Users ("ATCMU") and State of Maine cases, respectively—we review the temporary rates that were in effect from December, 1975 to July 18, 1976. Viewed together these cases prompt us not only to decide the individual merits of each claim but also to consider the Postal Service's overall progress to date in adapting to the Act's special, and quite demanding, ratemaking requirements. We bring to this task our prior experience in interpreting the complex procedures by which postal rates and fees are set under the Act.[2]

I. BACKGROUND

While each case before us offers its own unique theory for invalidating the rates or fees it challenges, all three

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[1] *See* 39 U.S.C. §§ 3621-25, 3641.

[2] *See Direct Mail Marketing Association, Inc. v. United States Postal Service*, 163 U.S. App. D.C. 157, 501 F.2d 717 (1974); *Association of American Publishers, Inc. v. Governors of United States Postal Service*, 157 U.S. App. D.C. 397, 485 F.2d 768 (1973); *Direct Mail Advertising Ass'n v. United States Postal Service*, 147 U.S. App. D.C. 394, 458 F.2d 813 (1972); *see also Mail Advertising Corp. of America v. United States Postal Service*, 148 U.S. App. D.C. 158, 459 F.2d 1182 (1972).

cases require an understanding of the ratemaking procedure prescribed in the Act.

A. *Legislative Requirements*

Briefly put the Act created the Postal Service, "an independent establishment of the executive branch of the Government of the United States," [3] which is directed by an eleven member Board of Governors ("Board") composed as follows: nine presidentially appointed "Governors"; the Postmaster General, who is the "chief executive officer of the Postal Service" [4] and is appointed by the Governors; and the Deputy Postmaster General, who is appointed by the Governors and the Postmaster General.[5] Some powers are conferred on the Governors as distinct from the Board.[6] The Act also created the independent, five member Postal Rate Commission ("Commission") which is charged with submitting to the Governors, upon request, "recommended decision[s] on changes in a rate or rates of postage or in a fee or fees for postal services." [7]

The ratemaking procedure prescribed by the Act may be summarized as follows. The Postal Service submits to the Commission a formal request for new rates or

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[3] 39 U.S.C. § 201.

[4] 39 U.S.C. § 203.

[5] 39 U.S.C. § 202.

[6] 39 U.S.C. § 102. For instance, the power to submit to the Commission a request for a recommended decision on changes in postal rates and fees is entrusted to the Postal Service and hence, under the terms of the Act, to the Board as the body which directs the exercise of power of the Postal Service, *see* 39 U.S.C. §§ 3622, 202(a), while the power to act upon recommended decisions submitted by the Commission is entrusted to the Governors, *see* 39 U.S.C. §§ 3625, 3624.

[7] 39 U.S.C. §§ 3601-04, 3622-24.

fees, which request may be accompanied by suggestions for rate adjustments which the Postal Service deems suitable.[8] The Commission must provide an opportunity for a hearing on the record and, at the conclusion of this proceeding, must transmit its recommended decision to the Governors.[9] The Governors then may approve the decision and order it into effect, or allow it to take effect under protest while seeking judicial review or Commission reconsideration, or reject it and have the Postal Service resubmit the request for reconsideration and a further recommended decision in which event the further recommended decision may, under limited circumstances, be modified by the Governors and put into effect as modified.[10] An aggrieved party who appeared in the Commission proceedings may appeal the "decision of the Governors to approve, allow under protest, or modify the recommended decision," and the reviewing court "may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision." [11]

To avoid any prolonged disruption to the Postal Service's financial integrity which compliance with this elaborate procedure might cause, the Act also provides for the implementation of temporary increases in rates or fees. If the Commission "does not transmit to the Governors within 90 days after the Postal Service has submitted, or within 30 days after the Postal Service has resubmitted, to the Commission a request for a recommended decision . . . the Postal Service, upon 10

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[8] 39 U.S.C. § 3622.

[9] 39 U.S.C. § 3624. An officer of the Commission shall be appointed "to represent the interests of the general public" at the hearing. *Id.*

[10] 39 U.S.C. § 3625.

[11] 39 U.S.C. § 3628.

days' notice in the Federal Register, may place into effect temporary changes in rates of postage [or] in fees for postal service." [12] A temporary rate or fee, however,

> may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title.[13]

In addition, if upon judicial review of a decision of the Governors on permanent rates, taken pursuant to 39 U.S.C. § 3628, the court "orders a matter returned to the Commission for further consideration, the Postal Service, with the consent of the Commission, may place into effect temporary [rates or fees]." [14] Finally, judicial review of temporary rates or fees may be sought in the district court.[15]

B. *Prior Ratemaking Proceedings*

To date three ratemaking proceedings have been initiated under the Act. The first proceeding (docket no. R71-1), which may be identified by its establishment of permanent 8 cent first class rates, began when the

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[12] 39 U.S.C. § 3641(a).

[13] 39 U.S.C. § 3641(c).

[14] 39 U.S.C. § 3641(b).

[15] Since "[s]ection 3628 which limits the jurisdiction of the courts, deals only with decisions of the Commission or the Governors; not with the Board of Governors—which exercises the power of the Postal Service to set temporary rates," *Mail Advertising Corp. of America v. United States Postal Service*, 148 U.S. App. D.C. 158, 159, 459 F.2d 1182, 1183 (1972), temporary rates are reviewed in the district court rather than the Court of Appeals.

Postal Service submitted a request on February 1, 1971. Temporary rates were put into effect May 16, 1971, and on June 29, 1972, the Governors approved the Commission's recommended decision and ordered permanent rates put into effect. On appeal pursuant to 39 U.S.C. § 3628 this Court affirmed the Governor's order. *Association of American Publishers, Inc. v. Governors of the United States Postal Service*, 157 U.S. App. D.C. 397, 485 F.2d 768 (1973) [hereafter cited as *American Publishers*].

The second proceeding (docket no. R74-1) established 10 cent first class rates. It was initiated with a request on September 25, 1973; temporary rates were put into effect March 2, 1974; and permanent rates were ordered September 4, 1975, after nearly two years of Commission proceedings. The NAGCP case seeks judicial review of this order pursuant to 39 U.S.C. § 3628.

The latest proceeding (docket no. R76-1), which may be identified by its proposal to establish permanent 13 cent first class rates, began with a request that was submitted September 18, 1975, and was resubmitted December 19, 1975.[16] The ATCMU and State of Maine cases were brought in district court to enjoin implementation of temporary rates based on this request. Following district court orders in which injunctive relief was granted on procedural grounds (ATCMU), but denied on substantive grounds (State of Maine), appeals were

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[16] At the same time the Postal Service sought also to implement permanent changes in fees for certain services. However, rather than including these proposed changes in its request for changes in postage rates, the Service sought to implement the fee increases simply by notice in the Federal Register with opportunity provided for comment by interested parties. Whether changes in such fees are subject to Commission jurisdiction and hence to the procedures of request, Commission hearing, recommended decision and Governors' order is a major issue in the ATCMU case and is discussed there.

taken to this Court. We stayed the district court injunction, and on December 31, 1975, temporary 13 cent first class rates were put into effect.

II. Nos. 75-1856, 75-1857: The NAGCP Case

The first case involves the second ratemaking proceeding conducted under the Act and is before us on NAGCP's petition to review the September 4, 1975 order of the Governors which approved the Commission's recommended decision and ordered into effect the permanent rates there recommended.

In that proceeding the Commission, after receiving the Postal Service's September 25, 1973 request for a recommended decision, assigned Chief Administrative Law Judge ("ALJ" or "Judge") Seymour Wenner, who had presided at the first ratemaking proceeding,[17] to preside at the hearing.[18] Taking part in the hearing, which began June 27, 1974, were some 29 full participants and 17 limited participants.[19] Extensive evidence was taken over some 46 days of hearings, the record being closed on December 20, 1974.[20]

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[17] *See American Publishers*, 157 U.S. App. D.C. at 408 n.18, 485 F.2d at 779 n.18 (Bazelon, C.J., concurring).

[18] 1—478. In accordance with 39 U.S.C. 3625(e) the record of the proceedings has been printed. It is organized into four main volumes. References to the record will be indicated by citation to the appropriate volume and page number in the following manner: —— – ——.

[19] 1—478. Among the participants were United Parcel Service of America, Inc., American Business Press, Inc., and National Newspaper Association, all three of which intervened in this appeal and filed briefs. Also participating in this appeal, as amicus curiae, is State of Maine, et al., appellant in No. 75-2238.

[20] "Ten witness appeared on behalf of the Postal Service, six for the [officer of the Commission], thirty-eight for other parties and two were called by the Judge." 1—479.

After briefing, issuance of the ALJ's initial decision (May 28, 1975), and two days of oral argument before the Commission, the case was submitted to the Commission, which transmitted its recommended decision to the Governors on August 28, 1975. The Governors' implementing order and this appeal followed.[21]

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[21] As in *American Publishers* our jurisdiction is invoked pursuant to 39 U.S.C. § 3628, which provides us with exclusive jurisdiction, mandates that we make this matter a preferred cause on our calendar, and prohibits us from suspending the permanent rates pending decision.

On September 4, 1975, the same day the Governors issued the order implementing the permanent 10 cent rates contested in NAGCP, the Board directed that a new request seeking further increases be submitted to the Commission. That directive resulted in the commencement of Commission proceedings on permanent 13 cent rates (docket no. R76-1). It also resulted, on December 31, 1975, in the implementation of the temporary 13 cent rates that are contested in ATCMU and State of Maine. *See* pp. 46-47 *infra*. All three cases were argued February 20, 1976. On June 30, 1976, the Commission transmitted to the Governors its recommended decision in docket no. R76-1, recommending implementation of permanent 13 cent rates; on July 7 the Governors approved the recommended decision; and on July 18 the permanent 13 cent rates became effective pursuant to the Governors' July 7 order. *See* 41 Fed. Reg. 29570 (July 16, 1976). The July 7 order is being challenged in this Court in *National Association of Greeting Card Publishers v. United Postal Service*, No. 76-1611.

No party to this appeal directed the Court's attention to the potentially significant events which occurred subsequent to oral argument. To say the least this failure, especially on the part of the Postal Service, is difficult to explain and hard to excuse. Since we may take judicial notice of such events and of the record in the related case, however, the implications of the Postal Service's subsequent action need not escape our review.

Although implementation of the new permanent rates may preclude this Court from presently providing an effective rem-

A. *39 U.S.C. § 3601*

At the outset we are met with the contention that the Commission, at the time it considered and composed its recommended decision, was improperly constituted under the Act and that therefore the actions it took, regardless of their validity otherwise, are without force and effect.

Section 3601 of the Act establishes the Commission and mandates that it be "composed of 5 Commissioners appointed by the President, not more than 3 of whom may be adherents of the same political party." At the time in question three of the Commissioners were members of the Republican Party while one was a mem-

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edy for any injury incurred as the result of the prior, allegedly unlawful permanent rates, *see* 39 U.S.C. §§ 3628, 3681, the appeal need not be dismissed as moot. Petitioner has a continuing interest in the establishment of postal rates that comply with the Act, and it appears from the record in No. 76-1611 that the new permanent rates are based on a methodology significantly similar to that which petitioner here challenges as violative of the Act. *See* pp. 67-68 *infra*. In short, it appears that the same controversy between the same parties has arisen anew. Moreover, less than eleven months elapsed between the order implementing permanent 10 cent rates, which prompted the instant petition to review, and the implementation of the permanent 13 cent rates, which is the basis of a suggestion of mootness, and there is nothing to indicate that this cycle will not be repeated to the possible frustration of future petitions to review. Indeed, representations of the Postal Service as to its present financial difficulties and the streamlining of Commission proceedings may suggest that the current permanent rates will be even shorter lived than their predecessors. In sum, the instant controversy falls squarely within the "capable of repetition, yet evading review" exception to mootness and therefore satisfies the case or controversy prerequisite to federal jurisdiction. *Roe v. Wade*, 410 U.S. 113, 124-25 (1973) (nine month human gestation period too short for completion of usual appellate process); *see also* note 107 *infra* and cases cited therein.

ber of the Conservative Party of New York State. The claim of improper composition rests in essence on the assertion that these two political parties are "the same political party" within the meaning of section 3601.

No claim is made that the organization of either party is a sham [22] or that one party exercises control over the other.[23] Rather, the heart of the argument is an assertion of sameness predicated on an evaluation of certain similarities in the political philosophies of the two parties. Believing it well outside our proper judicial role to undertake such an analysis, we exercise no jurisdiction and express no views whatsoever on the issue. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

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[22] For obvious reasons the argument is directed at the Conservative Party of New York and Commissioner O'Doherty rather than the Republican Party and its three Commissioners. However, we have already recognized the validity of the Conservative Party. *See Buckley v. Valeo*, —— U.S. App. D.C. ——, —— & nn.115, 118, 519 F.2d 821, 865-67 & nn.115, 118 (1975) *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), *modified*, —— U.S. App. D.C. ——, 532 F.2d 187 (1976). See also *Cooke v. Lomenzo*, 31 N.Y.2d 244, 288 N.E.2d 291, 336 N.Y.S.2d 457 (1972); *Pichler v. Jennings*, 347 F.Supp. 1061 (S.D.N.Y. 1972). And Commissioner O'Doherty's allegiance to the Conservative Party can hardly be doubted in view of the fact that at the time in question he was not only a registered voter but also a state official of the Party. *See also Application of Leichter*, 32 Misc. 2d 234, 223 N.Y.S.2d 789 (1961) (member of political party is bound by party rules).

[23] *See* note 22 *supra*. For example, in 1970 James Buckley won election to the Senate as a member of the Conservative Party by defeating a Republican Party opponent. *The World Almanac and Book of Facts 1971*, at 37 (L. Long ed.); *Congressional Quarterly's Guide to U.S. Elections* 500 (R. Diamond ed.). *See also Buckley v. Valeo*, —— U.S. App. D.C. ——, —— & n.118, 519 F.2d 821, 867 & n.118 (1975) *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), *modified*, —— U.S. App. D.C. ——, 532 F.2d 187 (1976).

Furthermore, even were we to assume that the Commission was improperly composed, there is a separate and independent reason why the actions here challenged would still be valid. At least since *Ex parte Ward*, 173 U.S. 452 (1899), the law has been clear that:

> A person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned.

United States ex rel. Doss v. Lindsley, 148 F.2d 22, 23 (7th Cir. 1945), *cert. denied*, 324 U.S. 863 (1945); *see United States v. Krueger*, 319 F. Supp. 225, 226-27 (N.D. III. 1970). In short, the remedy for improper composition is not invalidation of the Commission's action through indirect challenge, but rather removal of the allegedly disqualified Commissioner by way of direct attack.[24] *See, e.g., Ryan v. Hershey*, 445 F.2d 560 (8th Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971); *United States v. Chaudron*, 425 F.2d 605 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *United States v. Brooks*, 415 F.2d 502 (6th Cir. 1969), *cert. denied*, 397 U.S. 969 (1969).[25]

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[24] 39 U.S.C. § 3601; 5 U.S.C. § 7521. In addition, *quo warranto* might also be available as a direct attack device. *But see Newman v. United States ex rel. Frizzel*, 238 U.S. 537 (1915); *Blackburn v. O'Brien*, 289 F. Supp. 289, 292-93 (W.D. Va. 1968); *see also United States v. Machado*, 306 F. Supp. 995, 1000-02 (N.D. Cal. 1969).

[25] *United States v. Williams*, 317 F. Supp. 1363 (E.D. Pa. 1970), does not require an opposite conclusion. That case, and the case upon which for this point it relies exclusively, *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *see also United States v. Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969), *set aside* 439 F.2d 762 (9th Cir. 1969); *United States v. Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969), represent a line of authority inapposite to the instant case. *Williams*

B. *39 U.S.C. § 3622*

On the merits the case focuses on 39 U.S.C. § 3622, the section of the Act which sets forth the cost and noncost considerations that the Commission must take

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and *Machado* hold that a defendant being prosecuted criminally for failure to report for and submit to induction may raise as a defense the allegation that the local draft board was not duly constituted and that therefore the prosecution is unable to establish an essential element of its case, *i.e.* that the draft board complied with all applicable selective service regulations. The district courts in both cases entered judgments of acquittal.

We need not decide whether *Williams, Machado,* and cases following them represent the correct view on this issue. *Compare United States v. Nussbaum,* 306 F. Supp. 66 (N.D. Cal. 1969), and cases cited in text at this footnote; *see also United States v. Reeb,* 433 F.2d 381 (9th Cir. 1970), *cert. denied,* 402 U.S. 912 (1970) (affirming conviction despite the assumed fact that board members had not met the residency requirements, even assuming these requirements were mandatory rather than directory). All these cases involve the question whether the issue of an agency member's qualifications may be raised as a defense to a criminal prosecution for violation of an order of that agency. They do not, as in the instant case, ask whether the issue may be raised by way of an affirmative collateral attack upon the validity of the order as part of a civil suit directly challenging the substance of the order. The interest which justifies the general rule, *i.e.* avoiding "the uncertainty that would otherwise cloud . . . official public acts," *Nussbaum, supra,* 306 F. Supp. at 68, may be outweighed where criminal conviction could result from strict adherence to the rule and where raising the issue in the criminal proceeding may be the only praticable avenue open to the defendant at that time. *See McKart v. United States,* 395 U.S. 185 (1969); *Yakus v. United States,* 321 U.S. 414 (1944). The cases which have carved out the exception rely on just such a balancing. *See, e.g., Williams, supra,* 317 F. Supp. at 1367, 1370. In the instant case, however, no such countervailing interest exists.

into account in setting rates. The "most concrete" [26] of these, and only one of the subsections which deals expressly and exclusively with cost factors,[27] is subsection 3622(b)(3) which establishes

> the *requirement* that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.[28]

In response to section 3622 the Commission developed for this proceeding, and the Governors adopted by their order, a two-step process for allocating among the classes of mail all the costs of operation. While each step will be described more fully below,[29] the Commission's approach may be summarized at the outset as follows. The Commission sought as its first step to identify and allocate to each class of mail those costs which in its view indisputably were the result of providing that particular service. A rate floor for each class of mail, *see* note 58 and accompanying text *infra*, was thus established by "attributing" [30] a portion of the total costs on

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[26] *American Publishers*, 157 U.S. App. D.C. at 406, 485 F.2d at 777 (Bazelon, C.J., concurring).

[27] See pp. 37-39 *infra*.

[28] 39 U.S.C. § 3622(b)(3) (emphasis added).

[29] The Commission's "attribution" method is described *infra* at pp. 19-21. Its method for "assignment" of unattributed costs is discussed *infra* at pp. 21-23.

[30] As will become apparent below, the parties have attached differing meanings to the term "attributable" as used in subsection 3622(b)(3). The Commission equates attributable costs with marginal costs as that concept is defined in strict economics theory—a concept which imports notions of cost variability. Other parties, while not disputing that attribution connotes a cause and effect relationship, note that courts not infrequently construe the term in a less exacting manner

the basis of "cost variability"—an approach which evaluates changes in costs as a function of changes in output volume. As its second step, in order to take into account the noncost factors of section 3622, the Commission then judgmentally "assigned" all the remaining costs on the basis of demand factors designed to determine "what the traffic will bear" in each class of mail.[31] Under this "inverse elasticity rule" approach, final rates evolved by assigning all the unattributed costs to the various classes of mail in inverse proportion to the relative elasticity of demand for each class; *i.e.*, those classes of mail in which increases in rates hypothetically would cause lesser decreases in patronage were made to shoulder larger portions of the unattributed costs, while those with greater elasticity of demand were burdened with smaller markups above their attributed costs. Petitioner advances separate arguments to dispute each element of the Commission's approach.

1. *Commission's Approach to Subsection 3622(b)(3) and ALJ's Alternative Approach*

a. *Attribution.* The premise of the Commission's approach to attribution is its belief that cost variability is the only proper indicator of causation. As the Commission explains,

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than reliance on strict economics theory would permit. These parties offer varying definitions under which attribution would be accomplished by inferences of causation based on factors other than cost variability.

This debate is central to the case and is resolved below. However, to simplify discussion of this issue, we will use the term "attributable" throughout this opinion, unless otherwise indicated, in its nontechnical sense as implying no more than the existence of a cause and effect relationship, however that may be evidenced.

[31] *See Payne v. Washington Metropolitan Transit Comm'n*, 132 U.S. App. D.C. 321, 336, 415 F.2d 901, 916 (1968).

> if a particular cost varies with a change in volume units, we infer that the cost is caused by such change and can be attributed to the class or service experiencing the change.
>
> From volume variability, therefore, we can infer, and thereby establish, the causation that we seek. And by establishing minimum rates based on variable costs, we assure ourselves, the public, and Congress that no class has cross-subsidized any other class.[32]

The basic principles of this cost-of-service approach have remained unchanged since the Commission first adopted cost variability as its attribution methodology in the initial rate proceeding.[33]

The touchstone of the cost variability approach is the Commission's concern that causation be measured as accurately as possible—that within the bounds of available data, all elements of approximation or estimation be excluded.

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[32] 1—589 (footnote omitted). The Commission also attributed in this proceeding certain "specific fixed costs," *i.e.*, those costs which in the Commission's view can be identified with a single class of service without regard to volume. *See* 1—577. As defined by the Commission, however, these costs are almost insignificant, comprising approximately one percent of total costs. *Id.*

[33] To be sure there have been modifications of the formula. For instance, in the first proceeding attributable costs were strictly confined to those costs which vary in direct proportion to the number of pieces of mail from year to year, whereas in the proceeding here under review the Commission adopted a reasonable "planning cycle" period rather than the strict one year time span, *see* 1—482, and indicated a movement away from the confines of direct proportionality. But as Judge Wenner concluded, "in filing its proposal in [the second proceeding]. . . . Postal Service adopted substantially the same methods and principles it had used in the first proceeding." 1—2.

> [W]e believe that causation is both the statutory and the logical basis for attribution. Where an analysis based on causation cannot be made because data are lacking, we will do better to acknowledge that fact and press for a better data base than to construct an "attribution" on a basis not contemplated by the statute.[34]

The stricture of this approach and the unavailability of complete data led in the first two rate proceedings to recommended decisions which, by the Commission's own account, did not attribute to each class all the costs that likely were the result of providing the particular service.[35] In the first proceeding attributable costs were set at 49% of total costs. In the proceeding here under review the Commission, after revising upward the Service's proposal to attribute only 45.1% of costs, recommended that 52.5% of all costs be attributed.[36]

b. Assignment. The Commission used demand theory to assign all the remaining, unattributed costs (47.5%). An understanding of the Commission's approach requires an initial familiarity with the concept of demand elasticity. Simply put, the demand for a product is said to be elastic if lowering its price by a specific percentage

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[34] 1—587-88.

[35] The Commission noted, for instance, that "[w]here the record is incomplete or inadequate for [volume variability] analysis, we have not attempted to carry the attribution process farther than our data permit. Instead, we have assigned the relevant costs according to the noncost standards of the statute." 1—483. And it went on specifically to state its view that "more costs can and will be attributed in future cases." 1—484.

[36] Despite the percentage increase in attribution between the first and second proceedings, the amount of remaining costs subject to the Commission's judgmental assignment *rose* by some $1.5 billion as a result of an increase in total costs from $9.84 billion to $12.04 billion.

leads to a greater percentage increase in the volume sold, or if raising its price by a specific percentage leads to a greater percentage reduction in its volume.[37]

Elasticity of demand forms the cornerstone of a demand theory (or "value-of-service") approach to apportioning costs. Such an approach seeks to minimize the impact that an increase in rate will have on services with positive demand elasticities by "impos[ing] on the services in relatively inelastic demand . . . higher surcharges, over and above marginal costs, than would be imposed by *any* rule of apportionment based exclusively on cost relationships." [38]

The Commission has developed, and used in both the first and second rate proceedings, a specific formulation of demand theory—what it calls the "inverse elasticity rule"—as a guide in assigning unattributed costs. Under this rule final rates are derived by assigning to the various classes of mail different markups (above attributed costs) in inverse proportion to the relative elas-

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[37] 1—16. The coefficient of elasticity is computed mathematically by dividing a percentage change in volume by the associated percentage change in price. If the resulting number is between –1.0 and 0, *i.e.*, a coefficient of elasticity of less than unity, demand is said to be inelastic; *e.g.*, where a 10% price increase results in only a 5% or 3% volume decrease the coefficient of elasticity is –0.5 and –0.3 respectively. If, on the other hand, the resulting number is of a magnitude greater than –1.0 *i.e.* a coefficient of elasticity of greater than unity, demand is said to be elastic; *e.g.* where a 10% price increase results in a 20% or 30% volume decrease the coefficient of elasticity is –2.0 and –3.0 respectively. Coefficients of elasticity almost always bear negative signs because increased prices almost always produce decreased volumes, and vice versa, and therefore the numerator and denominator of the fraction will generally have opposite signs.

[38] *J. Bonbright, Principles of Public Utility Rates,* 378 (1961) (emphasis in original).

ticity of demand for each of the classes. It is the Commission's position that generally by using demand factors, and specifically by testing its recommended rates against the inverse elasticity rule, it "can assign costs in a manner that fully takes into account the noncost factors of the statute." [39]

The Commission acknowledges that all classes of mail are basically insensitive to price increases, and that demand in each class, at least at present and reasonably foreseeable rates, is technically inelastic—that is, a rate increase in any class of mail will necessarily generate an increase in revenue albeit at reduced volume.[40] Generally demand theory is used to minimize the impact that a rate increase otherwise would have on products that are demand elastic. The Commission posits, however, that despite the high degree of inelasticity that presently prevails among all classes of mail, demand theory is nonetheless proper in postal ratemaking since it may be based on *relative* demand elasticities (or, more accurately, relative *in*elasticities). Accordingly, in the instant proceeding the Commission purported to develop a ranking of relative price sensitivity among the classes of mail and, based on this ranking, sought to establish the "optimum rate for each mail class and service," which it defined as "that rate which maximizes the volume of mail while recovering all the related attributable costs and making some contribution to the fixed overhead, so that in the end total costs are recovered." [41]

c. Alternative approaches. In recommending its attribution/assignment methodology to the Governors, the Commission rejected entirely the initial decision proposed by Administrative Law Judge Wenner and instead

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[39] 1—627; *see* 1—660-66.

[40] 1—640.

[41] 1—625.

stood by the approach it first developed in the inaugural rate proceeding. In that proceeding ALJ (then Chief Examiner) Wenner severely criticized both the Commission's use of cost variability as its approach to attribution [42] as well as the Commission's reliance on the inverse elasticity rule as a guideline for assigning all the remaining costs.[43] However, constrained in that proceeding by the minimal cost data presented, the unavailability of alternative methodologies, and the "presumptions that surround an initial effort to formulate rates," the ALJ as well as this Court left undisturbed the Commission's initial use of cost variability and demand theory.[44]

When presented in the instant proceeding with the same approach, essentially unchanged, ALJ Wenner determined that the presumptions noted earlier no longer prevented full review.[45] Adopting and refining alternative methodologies advanced by various parties to the proceeding,[46] and using only the data provided in the Service's own submission, the ALJ proposed to the Commission an entirely different approach to attribution/

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[42] *See American Publishers*, 157 U.S. App. D.C. at 405-06 & nn.1, 6, 485 F.2d at 776-77 & n.1, 6.

[43] *See id.* at 407, 485 F.2d at 778.

[44] *Id.* at 407, 408, 485 F.2d at 778, 779; *see also* 1—867.

[45] "Postal Service's presentation in this proceeding makes it clear that the first and primary task of the Postal Rate Commission is to remedy the Service's deficient determination and attribution of costs. . . . The task is no longer to criticize and exhort; it is to do the job—now." 1—4.

[46] Judge Wenner noted that in the first proceeding the Commission "was constrained to accept Postal Service's attributable costs because no party had presented alternative costs and because the record did not provide a reliable basis for doing so," whereas in this proceeding several parties, including NAGCP, presented full cost data and alternative methodologies. 1—4.

assignment under which the ALJ attributed some 70.6% of costs and assigned the remaining costs primarily in accordance with cost-of-service rather than value-of-service principles.

The ALJ's attribution method proceeds from a premise quite at odds with that of the Commission. Whereas the linchpin of the cost variability approach is an abiding concern for the greatest possible accuracy in measuring causation, the ALJ's alternative approach devalues somewhat the interest in utmost accuracy in order to pursue more fully the goal of maximized attribution.[47] Simply put, the alternative approach relies on cost accounting principles to augment the inferences of causation derived through use of the cost variability theory. Additional attribution results from using distribution keys such as weight, volume and number of pieces of mail to apportion among the postal services affected those cost segments which clearly affect more than one service and which, although not measurably variable on presently available data, are reasonably susceptible to such apportionment. The approach is perhaps best understood by using transportation costs as an illustration of the method as applied.[48]

The transportation segment as constructed by the ALJ includes all the costs the Postal Service incurs, both for purchased and self-furnished services, to carry mail from

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[47] As Judge Wenner put it

> [T]he difference[] between CALJ costing and USPS costing is not merely a difference in small adjustments about whether this or that cost is related to this or that class of mail. The difference is that CALJ costing practices pursue a different aim, with improvements in light of criticisms in the record, the aim of tracing all cost consequences of providing a particular class of mail. Postal Service never attempted such an attribution. . . .

1—20, n.1.

[48] *See generally* 1—5-6.

the patron's collection point to the receiving point, including, in addition to salaries, the costs associated with the servicing, maintenance and depreciation of vehicles. It does not include, however, the actual delivery function, *i.e.*, handing the mail to the patron or putting it in the patron's box, which comprises a different cost segment. In the instant proceeding total transportation costs were $2.621 billion, of which the Postal Service attributed only $545 million (21%), characterizing the remaining $2.076 billion as fixed costs subject to judgmental distribution. The ALJ, however, by analyzing the transportation function as being governed by considerations of the weight and cubic volume of the mail handled (as contrasted with the actual delivery function which is more a factor of the number of pieces of mail[49]) was able to attribute $2.565 billion (98%), leaving only $56 million subject to discretionary assignment. His reasoning was straightforward:

> The cubic volume of mail determines the number and size of the vehicles required which affects the maintenance, fuel and lease costs. The weight of the mail affects the loading and unloading effort and also bears on the needed carrying strength and operational expenses of the vehicle. The cost of drivers varies with vehicle operations.
>
> The cost of the mail carrier's walking (or driving a vehicle) over his route is governed by weight and space. What he can carry in his pouch and his hands is affected by the weight (35 pounds maximum under Postal Regulations) and the size (in cubic volume) of the load; this determines how often he must return to the relay box or to his car. The weight and cubic volume of mail also affects the size of the vehicle he needs (where he has one).[50]

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[49] *See* 1—5.

[50] 1—5 (footnote omitted).

The ALJ's method for assigning the remaining costs is also quite opposed to principles underlying the Commission's adopted approach; it proposes complete rejection of the inverse elasticity rule.[51] Under the alternative approach each class of mail bears that portion of unattributed costs equal to its proportionate share of attributed costs unless individual and specific consideration of the noncost factors contained in section 3622(b) requires deviation from the standard markup.[52]

2. Requirements of Section 3622. Relying in large measure on the criticism leveled in the ALJ's initial decision, petitioner argues that the Commission's attribution/assignment approach is violative of the Act in several respects. Initially petitioner asserts that the Commission's cost variability method is a too restrictive approach for attribution which permits the expense incident to one service to be thrown upon the customers using another service, resulting in unlawful cross-subsidization. *See, e.g., Northern Pacific Railway Co. v. North Dakota,* 236 U.S. 585, 597-98 (1915). Petitioner also attacks the Commission's reliance on demand theory, and in particular its use of the "inverse elasticity rule," as a means for assigning all unattributed cost, arguing that this approach preserves historical rate differentials and otherwise unduly and unreasonably discriminates against first class mail. *See* 39 U.S.C. § 403(c).

The foundation of both arguments is the assertion that the Act imposes a special obligation that allocation in accordance with cost-of-service principles be carried out

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[51] 1—660-66.

[52] 1—20. One factor of which Judge Wenner understandably made particular note was the impact upon mail users that might result if in switching from past, oftentimes artificial rates to the present, more representative rates the standard markup would impose too drastic an increase. *See* 39 U.S.C. § 3622(b)(4); 1—20.

as far as reasonably possible. In *American Publishers* we found "a strong indication" that Congress intended to impose just such a special obligation.[53] In that case, however, in view of "the presumptions that surround an initial effort to formulate rates" we found it unnecessary to go beyond a mere preliminary assessment of the import of subsection 3622(b)(3).[54]

In this case, now that the Commission has had some five years of experience with the Act, the formidable task of definitively interpreting subsection 3622(b)(3) may no longer be deferred. We must first determine whether a thorough examination of the statute bears out our earlier assessment—whether, in short, the Act requires that special efforts be made to trace all the cost consequences of providing the various services and to allocate costs on this basis to the fullest extent reasonably possible. Only then may we evaluate the Commission's approach for compliance with the Act.

a. *Interpreting subsection 3622(b)(3).* We begin with the words of the statute. As noted above, subsection 3622(b)(3) requires that "each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other

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[53] 157 U.S. App. D.C. at 408, 485 F.2d at 779. In that case we were confronted with a methodology not significantly different from that presently before us. We observed there that the Commission's initial response to the concrete requirements of subsection 3622(b)(3) appeared "questionable at best." *Id.* at 406, 485 F.2d at 777.

Unless otherwise indicated all references to *American Publishers* hereinafter are to the concurring opinion of Chief Judge Bazelon in which Judges Tamm and Wyzanski joined.

[54] *Id.* at 408, 485 F.2d at 779. As we observed there, "Section 3622(b)(3) is susceptible of a variety of interpretations." *Id.*

costs of the Postal Service reasonably assignable to such class or type." [55]

Three important points are immediately apparent. First, unlike any of the other ratesetting factors contained in

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[55] Section 3622(b) provides in full:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other small matter at reasonable costs;
>
> (6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
>
> (7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services; and
>
> (8) such other factors as the Commission deems appropriate.

section 3622(b), subsection (b)(3) is set forth as a "requirement",[56] a fact which suggests its special role in the Act's ratesetting scheme. Second, the section uses words which further emphasize its importance by suggesting a substantial breadth to its coverage. For instance, both attribution and assignment are designed to reach "each" of the classes of mail and types of service. Moreover, not only "direct" but also "indirect" postal costs are to be attributed, and thereafter a portion of "all other costs" of the Postal Service are to be assigned. Third, the emphasis throughout the subsection is unmistakeably upon cost-of-service principles. Under the subsection each service must bear the postal costs "attributable *to* [it]" and in addition must also bear that portion of all other costs "reasonably assignable *to* [it]" (emphasis added). Thus, the very words of subsection (b)(3) disclose its concern that each class of mail and postal service shoulder all the postal costs that may reasonably be traced to the provision of that class or service.

Giving the statute a plain reading it seems clear that the first of the subsection's dual requirements calls for something more than minimal attribution. Had Congress intended, for instance, that cost variability be acceptable as an exclusive method for identifying attributable costs, it in all likelihood would not have given seemingly equal importance to the attribution of indirect, as of direct, postal costs. Strictly speaking, indirect costs may not be attributed by cost variability, at least not by short-term variability; rather, attribution of such costs as a practical matter necessitates the use to some degree of cost allocation formulae based on accounting principles.[57] Moreover, the report of the con-

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[56] *See* note 55 *supra; see also* pp. 37-38 *infra.*

[57] *See* 1 *A. Kahn, The Economics of Regulation: Principles and Institutions* 78 (1970).

ference committee confirms the view that Congress intended attribution under subsection 3622(b)(3) to extend beyond minimally attributable costs and to include to a significant extent those additional costs which, although not measurably variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service.[58]

A plain reading also clearly suggests that the other costs of the Postal Service that are to be "reasonably assigned" must also be allocated on cost-of-service principles. That is, after the process of extended attribution is complete, a portion of remaining costs are to be assigned to the various mail classes and postal services to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs. As discussed above, a primary theme of subsection 3622(b)(3) is its concern with fully tracing the cost consequences of providing the various services. Legislative history, which is explored more thoroughly below, confirms that this theme pertains as much to assignment as to attribution.[59]

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[58] H.R. Rep. 91-1363, 91st Cong., 2d Sess. 87 (1970) (the attribution provision "establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved").

[59] *See* pp. 34-39 *infra*. The provision that the various postal services should bear the "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly *assignable* to each class of mail or type of mail service" (emphasis added) was first contained in the Senate bill submitted to conference. *See* text at note 72 *infra*. Under this provision, each mail class or postal service, in addition to bearing "operating costs"—which one might reasonably equate with attributable costs—would also have been required to bear some portion of "overhead" and "other institutional

costs of the Postal Service" at least to the extent that a cause and effect relationship between those costs and the mail class or postal service to which they were to be assigned could properly be determined. *See* S. Rep. 91-913, 91st Cong., 2d Sess. 15 (1970); *see also id.* at 10. While more specifically directed to institutional costs in addition to operating costs than the House bill, the Senate provision parallelled in certain respects the House provision that "rates for each class of postal service cover the demonstrably related cost of such service." H.R. Rep. 91-1363, 91st Cong., 2d Sess. 87 (1970) (conference report); *see* text at note 70 *infra.*

At conference the Senate's version was adopted with an amendment that strengthened the role of this particular subsection, *see* pp. 37-38 *infra,* and added the attribution provision discussed above. However, while adding this provision, the conference bill nonetheless retained almost verbatim the Senate language regarding the assignment of overhead and other institutional costs, making only the most minor, cosmetic changes—*e.g.*, the applicable costs became described generally as "all other costs of the Postal Service," and "properly assignable" became "reasonably assignable."

In short, the "reasonably assignable" costs provision of subsection (b)(3) quite clearly continues the concept of its Senate bill predecessor that even overhead and other nonvarying institutional costs are to be allocated among the classes of mail and types of mail services on a cost-of-service basis to the extent it is reasonably possible to allocate specific costs to specific postal classes and services.

This interpretation of "reasonably assignable" costs fully comports with the significant differences between the rate-setting requirements of the preferred and nonpreferred classes of mail. Under subsection 3622(b)(3) a nonpreferred class of mail or type of mail service is required to bear, in addition to its attributable costs, that portion of the remaining costs reasonably assignable to it as well as any part of the residuum of costs that the Commission discretionarily allocates to it, *see* pp. 38-39 *infra.* By contrast, under section 3626, the section adopted at conference for the purpose of retaining certain rate preferences, *see* S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(i), so long as Congress appropriates funds to offset the foregone revenue, *see* 39 U.S.C. §§ 2401(i), 3627, the rates for the preferred classes of mail or kinds of mailer must be set so that the revenues received from those rates will not,

One last feature of subsection 3622(b)(3) is disclosed by giving the words of the statute their plain meanings. Congress did not intend that *all* postal costs be either attributed or assigned. Rather, the statute expressly provides that each class of mail or type of mail service must bear, in addition to its attributable costs, only "that portion of all other costs of the Postal Service *reasonably assignable* to such class or type" (emphasis added). Thus, some Postal Service costs will exist but will not be "reasonably assignable" to any particular class or type. The other factors enumerated in section 3622 will govern the allocation of these nonattributable and nonassignable costs. This makes good sense. With subsection 3622(b)(3) strengthened from a guideline into the only "requirement" among the eight ratesetting factors listed in section 3622, unless express provision were made for a third category of costs subsection 3622(b)(3) would be susceptible of an interpretation by which all the noncost factors of the remaining subsections could be read out of the Act. The conference report confirms that Congress acted expressly to prevent just such an interpretation.[60]

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after a phasing-in period, *see* 39 U.S.C. § 3626(1), "exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service)." While both attributable and assignable costs, as used in subsection 3622(b)(3), involve inferences of causation, the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former. *But see* note 74 *infra*. It is the freedom from having to bear either these more speculative costs of service or any portion of the residuum costs that constitutes the "preference" enjoyed by the classes of mail provided for in section 3626.

[60] H.R. Rep. 91-1363, 91st Cong., 2d Sess. 87 (1970) ("the conference substitute provides for a judgmental assignment of *some part* of the remaining costs") (emphasis added); *see also* note 59 *supra*.

While clearly the primary purpose of the Act's ratesetting provision is to assure that attribution and assignment in accordance with cost-of-service principles is carried out to the fullest extent reasonably possible, subsection (b) (3) provides at the same time for a residuum of costs to be used to give effect to the noncost factors expressly set forth in the Act.

Legislative history fully supports the plain reading of subsection 3622(b)(3) and reinforces the conclusion that first and foremost the Act requires that special efforts be made to maximize the use of cost-of-service principles in the allocation of postal costs.

Discrimination in postal ratemaking in favor of certain preferred classes of mail and to the great disadvantage of first class mail has long been a part of our postal system. As early as 1913 the Supreme Court, in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 303-304 (1913), recognized that Congress designed its postal rate structure to discriminate among classes of mail, conferring "pecuniary advantages of great consequence" upon certain classes of mail, always at the expense of first class, based "upon the conceptions of Congress as to how far it was wise for the general welfare to give advantages to one class not enjoyed by another." This practice, increasingly more formalized through the years, continued until the time of the Postal Reorganization Act.[61]

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[61] For instance, in 1955 the Post Office Department formally adopted a ratemaking formula which expressly provided that second and third class mail should be operated below cost and that the revenues thus lost should be recovered through increased rates for first class mail.

> Second-class mail should produce revenues sufficient to recover 50 percent of costs assigned to it under the Cost Ascertainment System; third-class mail should recover 75 percent of such costs; and . . . the difference should be reallocated to first-class mail and domestic air-

In seeking postal reform through the 1970 Act it was a central and express aim of both Houses of Congress to end the abuses of this practice—to get "politics out of the Post Office." [62] Congress realized that the result of this purposeful discrimination—the setting of rates for some classes of mail well below that necessary to recover the costs of providing the service [63]—was symptomatic of the political process. Debate over the Act discloses that Congress was well aware of the extent to which the availability of preferential rates, and the political nature of postal ratemaking in general, attracted lobbyists into the ratesetting process and invited the abuses that not

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mail in recognition of their higher service and value factors.

Post Office Department Cost Ascertainment Report for FY 1955, at III; *see* 1—859. And the Postal Policy Act of 1958, the statutory predecessor to the present Act for purposes of rate-making, formalized the practice of requiring first class to bear its full costs plus a premium in order that the rates for the preferred classes could be set at less than full cost. *See* 39 U.S.C. §§ 2302(c), 2303 (1958), 72 Stat. 136. For the Post Office Department's explanation of the differential pricing permitted by the Postal Policy Act of 1958, *see Report on Post Office Department Relating to Survey of Postal Rate Structure*, House Doc. No. 91-97, 91st Cong., 1st Sess. 6 (1960).

[62] H. R. Rep. No. 91-1104, 91st Cong., 2d Sess. 6 (1970); *see* S. Rep. No. 91-912, 91st Cong., 2d Sess. 8 (1970).

[63] "Under existing law, first-class mail and fourth-class parcel post are the only classes of mail in which there is any legislative requirement at all that they pay their full cost." S. Rep. No. 91-912, 91st Cong., 2d Sess. 10 (1970); *see also* 116 Cong. Rec. 21712 (June 12, 1970) (remarks of Sen. McGee) ("Except for first-class mail, no class of mail comes anywhere close, right now, to paying its fair share of the costs.").

infrequently result from their influence.[64] A major thrust of the postal reform effort therefore was to minimize this attraction of lobbyist influence by severely curtailing the broad discretion that had characterized prior rate-setting procedures and served to shield abuses of the system.[65]

The two Houses advanced different approaches for solving these problems. The Senate passed a bill that would have abolished all rate preferences, phasing in the expected rate increases over five and ten year periods to cushion the impact of the elimination of preferential treatment.[66] The House Bill, on the other hand, would

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[64] For instance, as Senator McGee noted:

> The committee believes that if Congress is to separate itself from periodic battles over rate adjustments, we should make the separation complete. We should get the Congress out of the clutches of the lobby list. To retain any ratemaking power is to insure that our halls will be filled with the representatives of special interest groups who will, as they always have, attempt to convince the Members of Congress that the world will truly come to an end if we raise the rate on their mail.

116 Cong. Rec. 21712 (June 26, 1970).

[65] Most of the money in the postal system comes from first class mail. A 100% increase in the rate for all second class mail would not produce as much revenue as a 5% increase in the first class rate. The temptation to resolve the financial problems of the post office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing the imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 13 (1970).

[66] S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(i); S. Rep. No. 91-912, 91st Cong., 2d Sess. 10-13 (1970); *see also* Cong. Rec. 21712-13 (June 26, 1970).

have written into law the preferences then existing by providing that "the preferential rates accorded these categories of mail will not be changed except by Congress, unless the Congress fails to appropriate funds sufficient to cover the revenue foregone because of the rate preference." [67] Moreover, the two bills differed significantly in the guidelines they prescribed for distributing postal costs to set postal rates: while both proscribed discrimination,[68] the Senate Bill required a reasonable allocation of all costs, including institutional costs,[69] whereas the House Bill provided only that each class of service would bear "at least those costs demonstrably related to [it]." [70]

These differences were subjected to conference bargaining. In exchange for the retention of enumerated preferences, the House accepted the Senate's standards for allocating costs.[71] Moreover, the standards of the Senate Bill, which in any event were more stringent than those proposed in the House Bill, were further strengthened at conference and expressly made applicable to all classes of mail (§ 3622(b)(3)) including the preferred classes (§ 3626). Subsection 3622(b)(3), which is the only 3622(b) ratemaking subsection which was not taken verbatim from the Senate Bill, was originally only a guideline that the Commission, in determining rates, consider "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly

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[67] H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 18 (1970); *see* H.R. 17070, 91st Cong., 2d Sess. (1970), at § 1202.

[68] *See* S. 3842, 91st Cong., 2d Sess. (1970), at §§ 101(c), 503(c); H.R. 17070, 91st Cong., 2d Sess. (1970), at § 401(c). *Compare* 39 U.S.C. §§ 101(d), 403(c).

[69] *See*, S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(g)(3).

[70] H.R. 17070, 91st Cong., 2d Sess. (1970), at § 1201(c).

[71] *See* H.R. Rep. 91-1363, 91st Cong., 2d Sess. 85-87 (1970); *see also* 1—864-65.

assignable to each class of mail or type of mail service." [72] But when it emerged from conference this guideline had become "the *requirement* that each class of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." [73] *See* note 59 *supra*.

It is quite apparent from this history that the conference committee amendments to subsection (b)(3) were designed to reemphasize the severe limitations that the Act places upon the Service's ability to set rates other than in strict accord with cost-of-service principles. Prior to the Act the Service enjoyed broad discretion in the allocation of postal costs, a discretion which in the past had made the setting of postal rates susceptible to political bartering and the frequently abusive influence of lobbyist efforts. We are persuaded that the conference committee amendments, which apparently were insisted upon by the Senate conferees in exchange for the major concession of retaining certain preferential classes of mail, were intended to clarify the extreme degree to which the Act restricts that prior, and quite problemful, discretion. In view of this it would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential for continuing the very same discriminatory treatment that the Act so clearly intended to remedy.

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[72] S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(g)(3).

[73] 39 U.S.C. § 3622(b)(3) (emphasis added). As we have previously noted, subsection 3622(b)(3) is the "most concrete" of the ratemaking guidelines contained in the Act. *American Publishers*, 157 U.S. App. D.C. at 406, 485 F.2d at 777.

Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably [74] be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

b. Compliance with the Act. In deciding whether the Commission's adopted ratemaking approach complies with the requirements of the Act we are not unmindful that the scope of our review is limited. Absent a specific statutory command to the contrary our task is simply to ensure that the Commission has followed proper procedures, that it has considered the relevant and excluded the irrelevant, and that its ratemaking order has produced no arbitrary result.[75] As we said in *American Publishers*, however, we must also be assured that the Postal Service has not "flouted a statutory command." [76]

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[74] We emphasize that "reasonably" as used in subsection 3622(b)(3) in connection with assignable costs must be read against the overall purpose of the section, which is to maximize the use of cost-of-service principles throughout postal ratemaking. Simply put it means that all reasonable efforts must be made to assign unattributed costs to the various classes of mail and service by use of acceptable cost-of-service estimates rather than to allocate them discretionarily as residual costs.

[75] *E.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *American Publishers*, 157 U.S. App. D.C. at 404, 485 F.2d at 775 (Wyzanski, J.).

[76] 157 U.S. App. D.C. at 404, 485 F.2d at 775 (Wyzanski, J.).

The overriding feature of this case is the express mandate of subsection 3622(b)(3) that all reasonable efforts be made to trace the cost consequences of providing each mail class or service and to allocate postal costs on that basis to the fullest extent possible. In specifically requiring that the Commission endeavor to maximize the use of cost-of-service principles, Congress deliberately went beyond the general ratemaking requirement that rates be fair and equitable.[77] It is the Commission's duty therefore to respond faithfully and not grudgingly to this plain command of the statute, and it is equally our duty to carefully scrutinize responses to this particular aspect of the Act's overall ratesetting scheme and to reject efforts that fail to comply with this special requirement[78]—efforts which, in short, flout the express command of the Act.

(1) Attribution. There is no contention in this case that cost variability is an invalid starting point in the attribution of postal cost[79]—all the parties before us employ it to some extent. The issue rather is whether the Commission's reliance on cost variability, to the virtual exclusion of other considerations, is insufficiently responsive to the Act's express concern for extended attribution.[80]

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[77] That postal rates be established that are "fair and equitable" is both an underlying premise of the Act, *see* 39 U.S.C. § 101(d), and a specific noncost factor which may be considered in allocating residual costs, *see* 39 U.S.C. § 3622(b)(1).

[78] *See Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1945).

[79] *See generally J. Bonbright, Principles of Public Utility Rates* 337-68 (1961); *cf. New York v. United States*, 331 U.S. 284 (1947).

[80] *See* pp. 28-39 *supra*.

Our task, of course, is not to prescribe an acceptable percentage level of attribution.[81] Nor are we charged with selecting from among alternative approaches available to the Commission the one approach which we deem most responsive to the underlying purposes of the Act. We are an appellate court, not an agency possessed of developed expertise. We look to the design of the Commission's approach not to substitute our judgment for that of the agency, but only to determine whether the Commission's adopted method falls unconscionably short of the statutory requirements.

As noted above, the Commission acknowledges that presently incomplete data preclude full attribution under its cost variability approach.[82] It insists, however, that utmost accuracy in the measurement of causation must prevail over all else.[83] In our view this allegiance to the goal of greatest possible accuracy fatally flaws the design of the Commission's adopted method since at present the Commission s goal may be obtained only by sub-

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[81] The following table is a comparison of attribution percentages achieved by the various parties:

ALJ	OOC	UPS	Commissioner Saponaro	USPS	PRC
70.6%	77.4%	83.6%	70.6%	45.1%	52.5%

See 1—888, 940.

The ALJ, given his special role, might properly have given great weight to a comparison between the seemingly low percentage achieved under the Commission's approach and the much higher percentages generated by the alternative methodologies. He may in fact have determined implicitly that after five years of acquaintance with the Act, attribution of only 52.5% was simply not enough. *See* note 45 *supra.* But our role is quite different and our decision does not rest on any determination that a certain percentage level of attribution is dictated by subsection 3622(b) (3).

[82] *See* note 35 *supra.*

[83] *See* pp. 20-21 *supra.*

stantially disregarding the Act's express concern for extended attribution.

The Commission suggests, however, that it had no choice but to continue to rely on its cost variability methodology since each of the alternative approaches presented to it failed to meet the requirement that agency action be nonarbitrary and the product of reasoned decisionmaking.[84] We are unpersuaded. Attribution methods such as those used in the alternative approaches are not infrequently employed in agency ratemaking. *E.g., Domestic Passenger-Fare Investigation, Phase 9-Fare Structure*, C.A.B., Order No. 74-3-82, Docket No. 21866-9 at 32 (March 18, 1974); *Domestic Service Mail Rate Investigation*, 47 C.A.B. 310, 312-14, 339 (1967); *Reopened Pan American Mail-Rate Case*, 35 C.A.B. 540, 546-47 (1962); *Area Rate Proceeding*, 34 F.P.C. 159, 192-93 (1965); *Atlantic Seaboard Corp.*, 11 F.P.C. 43, 56 (1952); *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 353 (1945). Moreover, they have been upheld by the courts. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945); *see also Commonwealth of Pennsylvania and New York State Department of Transportation v. Interstate Commerce Commission*, —— U.S. App. D.C. ——, —— F.2d —— (D.C. Cir., March 31, 1976); *Payne v. Washington Metropolitan Transit Comm'n*, 134 U.S. App. D.C. 321, 340-41, 415 F.2d 901, 920-21 (1968).

To be sure, the use of average costs must be based on substantial evidence and reasoned findings. *See, e.g., Baltimore & Ohio Railroad Co. v. Aberdeen & Rockfish Railroad Co.*, 393 U.S. 87 (1968). But these alternative

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[84] *E.g., Greater Boston Television Corp. v. Federal Communications Commission*, 143 U.S. App. D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971).

approaches, which the Commission labels and tries to dismiss as merely "accounting methods of costing," may not be put aside simply by asserting that "different judgments can produce highly different allocations of common costs, and there is no rational basis to choose one allocation over another." [85] The mere fact that a different formulation of the same distribution keys would result in a different overall attribution does not necessarily render the methodology arbitrary. In fact, the same criticism can be made of a cost variability methodology. As the Commission itself noted, the longer the time span chosen, the greater the percentage of costs which may be attributed on that basis: "[I]f the inputs are viewed over the extreme long-run . . . attribution would reach 100 percent." [86]

The point is that a ratemaking approach may not be disregarded simply because it lacks perfection; [87] to be acceptable a methodology need only be reasoned, nonarbitrary and permissible under the statute. As Judge Wenner candidly and aptly observed in criticizing his own method, "[d]oubtless more refined methods and judgments will be developed in future cases as more facts are discovered; but a space and weight allocation for transportation is a sound and workable solution to the problem at this stage of postal rate regulation." [88] *Compare Commonwealth of Pennsylvania and New York State Department of Transportation v. Interstate Commerce Commission*, —— U.S. App. D.C. ——, —— F.2d

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[85] 1—596 (footnote omitted).

[86] 1—609.

[87] *See Commonwealth of Pennsylvania and New York State Department of Transportation v. Interstate Commerce Commission*, —— U.S. App. D.C. ——, —— F.2d —— (D.C. Cir., March 31, 1976), slip op. at 11.

[88] 1—6, (footnote omitted).

—— (D.C. Cir., Mar. 31, 1976); *Domestic Service Mail Rate Investigation, supra*, 47 C.A.B. at 317. The alternative approaches presented to the Commission seem plainly to have been reasonable efforts motivated by a concern for fuller attribution and designed simply to go beyond the inferences of causation presently derivable under a cost variability theory.[89] We are unpersuaded that the Commission may properly disregard them as unsupported in the record and irrational.[90]

We conclude that in the circumstances of this case the Commission's almost exclusive reliance on a cost variability approach to attribution contravenes a primary purpose of subsection 3622(b)(3) and therefore fails to comply with the Act.[91]

(2) Assignment. The Commission's value-of-service approach to assignment of unattributed costs also fails to comply with a plain requirement of the Act. The Commission clearly misreads the second part of subsection 3622(b)(3). It interprets the "reasonably assignable" costs provision of subsection (b)(3) as wholly unrelated to cost-of-service considerations and directed instead only to the judgmental distribution of unattributed costs on the basis of the noncost factors contained in section 3622(b) and especially the value-of-service consideration of subsection (b)(2).[92] As we have explained, however,

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[89] *See* 1—878.

[90] *See* 1—585-86.

[91] The Commission's attribution of "specific fixed costs," *see* note 32 *supra*, does not affect our holding. At least as presently implemented that modification to the Commission's reliance on cost variability is so minimal as to be insignificant when viewed against the statute's express concern for extended attribution.

[92] This interpretation, although clearly wrong, is certainly understandable as a reaction to our preliminary assessment

"reasonably assignable" costs must be allocated in accordance with cost-of-service principles, and it is only residual costs which are subject to discretionary distribution to give effect to the noncost factors.[93] We conclude that the Commission's present method for assigning unattributed costs proceeds from a faulty premise in contravention of the Act and therefore must be rejected.[94]

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of subsection 3622(b)(3) in *American Publishers*. While our analysis in that case emphasized the special role that cost-of-service principles must play in postal ratemaking, it did not clearly expose the extent to which these principles infuse not only "attributable" costs but "reasonably assignable" costs as well.

[93] *See* pp. 28-39 *supra*.

[94] Even viewing the Commission's use of value-of-service in the more limited context as an approach for allocating only residual costs, *i.e.*, those costs permissibly subject to allocation-based noncost considerations, there is serious doubt whether such an approach is authorized under the Act. First, under present circumstances, where even the Commission concedes that every class of mail is demand inelastic at current and reasonably foreseeable rates, *see* 1—640, it may be questioned whether the Commission is able to meet the requirement that value-of-service be employed only where *all* farepayers, even those discriminated against, are benefitted. *See Payne v. Washington Metropolitan Transit Comm'n*, 134 U.S. App. D.C. 321, 336-37, 415 F.2d 901, 916-17 (1968). For an example of circumstances in which discriminatory, value-of-service pricing may "result in lower fares to the public as a whole," *id.* at 336, 415 F.2d at 916 (footnote omitted), *see J. Bonbright, Principles of Public Utility Rates* 309 (1961); *see also id.* at 383.

Second, even if proper circumstances did prevail, *i.e.*, if at least one class of mail were demand elastic, it is doubtful whether the Commission could properly employ the inverse elasticity rule, as it apparently did here, as a mechanical device to take into account through a single formula *all* the noncost factors set forth in the Act. *See* 1—627. The Commission is required to exercise its discretion in fact, and under the terms of the Act this may necessitate that it give indi-

We wish to emphasize that our holding with regard both to attributable and assignable costs is narrow. Our duty in this case is not to prescribe any one metholology, and nothing we say here should be taken as approving in advance any particular approach. The selection of one approach from among acceptable alternatives is a matter for agency expertise. We hold only that in the circumstances of this case neither the Commission's reliance on cost variability as the key to attribution nor its use of demand theory as a premise for allocation of unattributed costs complies with the Act because both plainly contravene in different ways the express statutory command that in setting postal rates every reasonable effort be made to employ cost-of-service principles to the fullest extent possible.[95]

III. Nos. 75-2227, 75-2228 and No. 75-2238: The ATCMU and the State of Maine Cases

The remaining cases involve the most recent ratemaking proceeding (docket no. R76-1) and raise challenges,

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vidual and specific consideration to each of the enumerated noncost factors even if after such consideration it properly decides not to vary from proportional markups on the basis of any particular factor. *Compare Payne v. Washington Metropolitan Transit Comm'n, supra,* 132 U.S. App. D.C. at 338-39, 415 F.2d at 918-19.

[95] Adapting to the requirements of subsection 3622(b)(3) should not prove too great a burden on the Commission. Obviously there is no bright line distinction between those costs properly attributable under extended inferences of causation and those properly assignable through best available cost-of-service estimates. *But see* note 59 *supra*. Of far greater importance than any definitive and categorical definition of "attributable" or "assignable" as used in subsection 3622(b)(3) is the explicit requirement that postal costs, however characterized, be allocated in accordance with cost-of-service principles to the fullest extent reasonably achieveable. *See also* note 74 *supra*.

on procedural (ATCMU) and substantive (State of Maine) grounds, to the Postal Service's authority in the circumstances of this case to propose permanent increases in fees for special services and to authorize temporary postal rates to be in effect pending completion of Commission proceeding in docket no. R76-1.

At its September 4, 1975 Board meeting, immediately after the Governors issued the rate order contested in NAGCP, the Board convened and discussed the need for further increases in postal rates and fees. After reviewing the "general magnitude" [96] of the increases management deemed appropriate, the Board authorized the Postal Service to submit a request for postal rate increases with the Commission by September 19 and further authorized the Service unilaterally to increase "fees for various special services . . . after allowing a period for public notice and comment on the proposed increases." [97] On September 18, without obtaining Board review of the completed request, the Postal Service filed the rate request with the Commission.[98] Also pursuant to the Board's directive the Postal Service, on September 19, announced its intention to increase fees for various special services and solicited comments of interested parties.[99]

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[96] Minutes of the September 4, 1975 Meeting of the Board of Governors of the United States Postal Service, at 3-5 [hereafter cited as "September 4 Minutes"].

[97] *Id.* at 5.

[98] 40 Fed. Reg. 44044 (Sept. 24, 1975). On October 8, 1975, appellee Associated Third Class Mail Users filed an objection with the Commission asking the Commission to return the request to the Postal Service on grounds that the completed request was never reviewed or approved by the Board. The Commission dismissed this objection on October 21. Brief for Appellee Associated Third Class Mail Users, at 7.

[99] 40 Fed. Reg. 43233 (Sept. 19, 1975).

On October 9, the Postal Service published notice that it would impose temporary rate increases on December 28, 1975, in substantially the same amounts as the requested permanent rates, unless by December 18 the Commission had transmitted its recommended decision to the Governors.[100] The proposed increases in fees for special services were scheduled to take effect on January 3, 1976.[101]

On October 29 appellant State of Maine, representing itself and sixteen other states, filed a complaint in district court raising substantive arguments and seeking declaratory and injunctive relief to prevent the Postal Service from implementing the temporary rate increases. (No. 75-2238) Two days later appellee ATCMU filed suit seeking similar relief on procedural grounds against the proposed fees as well as the temporary rates.[102] (Nos. 75-2227, 75-2228)

On November 7 the Board, noting the complaint filed by ATCMU, met and resolved that the Board action at the September 4 meeting was consistent with the

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[100] 40 Fed. Reg. 4787 (Oct. 9, 1975).

[101] While the notice published by the Postal Service did not specify a date when the proposed increases would be put into effect, a subsequent press release indicated plans to implement the increases in early November 1975. Memorandum of Points and Authorities of Plaintiff Associated Third Class Mail Users in Support of Motion for Preliminary Injunction, Appendix (Nos. 75-2227, 75-2228), at 28. Still later the Postal Service announced that the proposed increases would go into effect January 3, 1976. *Associated Third Class Mail Users v. United States Postal Service*, Civil No. 75-1809 (D.D.C. filed Dec. 16, 1975), Memorandum Opinion and Order, at 3 [hereafter cited at *ATCMU Opinion*].

[102] Appellee National Easter Seal Society for Crippled Children and Adults, after being granted leave to intervene as plaintiff, filed a complaint limited to the issue of fees.

Board's prior practice.[103] On December 16, however, the district court, in ruling on ATCMU's complaint, concluded that the Postal Service had not complied with the procedural requirements of 39 U.S.C. § 3601 *et seq.*,[104] as implemented through the Board's Operating Procedures. Accordingly, on the parties' cross motions for summary judgment, the Court, on December 16, entered judgment for appellee ATCMU and enjoined the Postal Service from putting the temporary rates into effect or from implementing the fee increases until it submitted to the Commission an appropriate request and otherwise complied with the requirements of section 3601 *et seq.* On the same day, in the State of Maine case, the district court denied appellant's motion for preliminary injunction, and on December 18, on appellant's unopposed motion, entered final judgment against State of Maine.[105]

On December 19 the Board convened a special meeting to take action in response to the injunction entered in the ATCMU case. After reviewing the "specific rates and fees to be requested" as well as "full supporting data and documentation," the Board directed the Postal Service to submit appropriate requests to the Commission.[106] The rate request was resubmitted the same day;

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[103] Minutes of the November 7, 1975 Meeting of the Board of Governors of the United States Postal Service, at 1-2 [hereafter cited as "November 7 Minutes"].

[104] Chapter 36, 39 U.S.C. § 3601 *et seq.*, sets forth the procedure of rate request, Commission hearing, recommended decision, and Governors' order. *See* discussion at text accompanying notes 8-15 *supra.*

[105] The court treated the preliminary injunction hearing as a consolidated hearing on the merits. *See* Rule 65(a)(2), Fed. R. Civ. Pro.

[106] Minutes of the December 19, 1975 Meeting of the Board of Governors of the United States Postal Service, at 2-3 [hereafter cited as "December 19 Minutes"].

the request for changes in fees for special services was submitted January 5, 1976.

Appeals were taken from the district court judgments in both cases. In the ATCMU case appellant Postal Service moved this court for summary reversal or, alternatively, a stay of the district court order pending appeal. At the same time appellant State of Maine sought an injunction of the increases pending appeal. On December 29, 1975, after hearing argument in both cases, we denied State of Maine's request for an injunction, denied the Postal Service's motion for summary reversal, but granted the Service's alternative motion for stay, limiting its effect to the temporary rates. As a result the Postal Service, on December 31, put the temporary rates, including the 13 cent first class rate, into effect. The fees for special services, however, remained subject to the district court injunction.

We will address each case in turn.

A. *The ATCMU Case.*

On the merits,[107] we will address separately the two distinct issues presented in this case: first, whether the Postal Service is authorized unilaterally to establish fees for special services, and secondly, whether the Postal Service's September 18 request for postal rate increases was validly submitted to the Commission.

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[107] The appeal need not be dismissed as moot. True, the district court injunction has expired by its own terms now that the 90 days required in section 3641 have elapsed since the Postal Service, in compliance with the terms of the order, resubmitted its rate request on December 19 and submitted an initial request for increases in fees for special services on January 5. However, it is well settled that "voluntary cessation of alleged illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W.T. Grant*, 345 U.S. 629,

1. Proposed Changes in Fees for Special Services. The first issue turns on whether the fees for the kinds of special services at issue in this case [108] are "fees for postal services" within the meaning of 39 U.S.C. § 3622. If so, then they fall within the Commission's jurisdiction and

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635 (1953). The submissions of December 19 and January 5 were a direct and voluntary response to the district court order at issue in this case. And rather than there being " 'no reasonable expectation that the wrong will be repeated,' " *id.* at 633 (footnote omitted), the Postal Service's corrective action here clearly was taken under protest and in expectation of appeal. *See United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290, 308 (1897). The "voluntary cessation of allegedly illegal conduct" exception to mootness thus applies here. *See also DeFunis v. Odegaard,* 416 U.S. 312, 318 (1974).

Moreover, given ATCMU's abiding and continuing interest in the setting of postal rates and fees that comply with the Act and the Postal Service's expressed view that the order here at issue was in error, there is "a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). Yet, because an order such as this is by its nature short-lived, the dispute will evade review, or at least considered plenary review, unless the appeal is heard now. Therefore, the "capable of repetition, yet evading review" exception to mootness is also applicable here. *E.g., Nebraska Press Ass'n v. Stuart,* —— U.S. ——, 44 USLW 5149, 5151 (U.S., June 30, 1976); *Sosna v. Iowa,* 419 U.S. 393, 397-403 (1975); *Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911); *Golden Holiday Tours v. CAB,* —— U.S. App. D.C. ——, 531 F.2d 624, 626 (1976). *See also* note 21 *supra.*

[108] The services in question include: (1) the furnishing of mail list corrections; (2) the privilege of prepayment of postage without stamps; (3) the forwarding or returning of undeliverable mail; (4) the registry of mail; (5) the insurance of mail; (6) the provision of COD mail; (7) the certification of mail; (8) the securing of a signed receipt upon the delivery of mail and the returning of it to the sender; (9) special delivery; (10) the special handling of mail; (11) the provision of money orders. *See* 40 Fed. Reg. 43233-34 (Sept. 19, 1975).

as such may be changed only in compliance with the Chapter 36 procedure of request, Commission hearing, recommended decision, and Governors' order. Appellees contend, and the district court held, that these services would be considered postal services in ordinary parlance and that the fees set for these services have substantial public effect.[109] The court concluded therefore that under the most reasonable interpretation of Chapter 36 of the Act these fees are subject to the Commission's jurisdiction. Appellants argue, however, that the Act meant to continue the distinction drawn under prior postal legislation between postal and special services and that under this distinction the Postal Service retains the authority unilaterally to change the fees for the services here involved, which it denominates special nonpostal services. Without adopting all the reasoning of the district court on this point, we find its interpretation of the Act persuasive and its holding legally correct and adequately supported.[110]

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[109] *ATCMU Opinion*, at 11-13.

[110] Ordinarily, of course, a reviewing court must give great deference to the interpretation given a statute by the agency charged with its administration, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and should not substitute its judgment for that of the agency if the agency's construction is reasonable, *e.g.*, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975). Both the district court and this Court have been informed by this principle in analyzing the interpretation of the Act offered by the Postal Service and in rejecting it, after giving the Service due deference, as a construction too "curious" and "narrow" to prevail over a commonsense reading of the statute. *See* note 113 *infra* and accompanying text. We note at the outset, however, a peculiarity of this case which lends further support to our conclusion. The Postal Rate Commission, which at the very least is a co-participant with the Postal Service in the administration of the Act's ratesetting process, took the somewhat unusual step in this case of filing with the district court its own memorandum of law on the fees for special services issue. In

Section 3622 of the Act establishes the Commission's jurisdiction over "changes in a rate or rates of postage or in a *fee or fees for postal services.*" [111] Other sections of the Act indicate that use of the phrase "fees for postal services" was not inadvertent and was intended to mean something quite apart from "rates of postage." For instance, where a particular section applies only to rates for postage, the phrase "fees for postal services" is omitted.[112] Since the Act provides no specific definition of "postal services," however, we must construe its meaning within the purposes of the Act, looking to legislative history where the words themselves, read plainly, are inadequate. *See* note 110 *supra.*

Giving "postal services" a plain meaning, all of the services here at issue may reasonably be so classified. With one possible exception, each clearly involves an aspect in the posting, handling and delivery of mail matter. *See* note 108 *supra.* As for the one possible exception—money orders—it is undisputed that the great majority of these are sent through the mail and that therefore the provision of money orders may itself reasonably be viewed as intimately a part of postal services. Appellants, however, offer a somewhat curious construction of the phrase that would exclude all of these services.

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that memorandum the Commission advances an interpretation of the Act quite at odds with that of the Service and fully in accord with the conclusion reached by the district court. *See* Memorandum of Law by the Postal Rate Commission, at 1, in Appendix at 121 ("the Commission's official position on the [fees] issue . . . has historically been opposed to that of the . . . Postal Service"). The district court, in short, without expressly stating so might simply have deferred to a long-held and reasonable interpretation given the statute by the very agency whose jurisdiction is at issue.

[111] 30 U.S.C. § 3622(a) (emphasis added).

[112] *See* 39 U.S.C. §§ 3626, 3627, 3683.

They would define postal services to include only a few items such as bulk mailings and use of business reply mail, for which flat fees are charged, and Saturday delivery of mail and home delivery of mail in rural areas, for which no fee at present is charged. They would exclude in general apparently all services not intimately connected with the actual delivery of mail.

Appellants fail to provide, however, any reasonable basis for their restrictive construction or any reason whatsoever why it should prevail over a commonsense interpretation.[113] Moreover, section 3621, which provides that "[p]ostal rates and fees shall be fair and equitable," applies specifically to "rates of postage and fees for postal services." [114] Applying appellants' construction to section 3621 would lead to the improbable conclusion that while Congress was concerned that fees for such comparatively limited services as bulk mailing be fair and equitable, it was not at the same time concerned that fees for the more generally used services of special delivery and certified mail also be fair and equitable.[115] Absent a well reasoned explanation, and none has been

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[113] We are reminded on numerous occasions that " 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' " *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925), *quoted in Chandler v. Roudebush*, —— U.S. ——, 44 USLW 4709, 4712 (U.S., June 1, 1976). *See also* note 110 *supra*.

[114] 39 U.S.C. § 3621.

[115] Nor can appellant convincingly argue that "fees for postal services" means something different in 39 U.S.C. § 3622 (establishing the Commission's jurisdiction) than in 39 U.S.C. § 3621 (establishing the Governor's authority to fix rates). *See, e.g., Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932).

provided to us, we cannot accept a construction that necessitates such curious results.

In sum, we agree with the district court that a plain reading is the proper reading of section 3622: "postal services" as used there is a generic term and was meant to include all the special services here at issue.

Appellants' arguments based on prior legislation do not convince us to the contrary. It is true that prior to the Act the fees here involved were denominated "fees for special service" and were prescribed by the Postmaster General,[116] while postal rates and fees were set by Congress.[117] The argument that this distinction was preserved in the Act, however, ignores the fundamental change Congress intended in creating the Postal Rate Commission. More than this the argument rests on a wholly unconvincing construction of scattered sections of the Act.

Appellants argue, for instance, that section 4(a) of the Act, by "transferr[ing] to the United States Postal Service all the functions, powers, and duties of the Post Office Department and the Postmaster General of the Post Office Department," [118] evidences an intent to preserve the distinction and to maintain in the Postal Service unilateral authority to establish fees for special services. But section 4(a) was clearly only a transitional provision designed to assure that there would be no lapse in the rendering of services as the old Post Office Department became the new Postal Service. It taxes credibility to believe that Congress, after devoting an entire chapter of the Act to defining the powers and duties of

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[116] *See* 39 U.S.C. §§ 507, 5009, 5010 (1964 ed.); 39 U.S.C. § 4106 (1964 ed., Supp. V).

[117] *See, e.g.*, 39 U.S.C. §§ 4253, 4452 (1964 ed.).

[118] 39 U.S.C. § 201 (note).

the Postal Service, would then use such an obscure device to transfer significant additional power.

Reliance on 39 U.S.C. § 404(b) is equally without merit. Section 404(b) vests the Postal Service with power "to provide, establish, change, or abolish special[,] nonpostal or similar services." [119] Appellants argue that this, as well as the absence in section 3622 of any specific mention of "special services," establishes its power unilaterally to set fees for those services. But the power to establish, change or abolish certain services does not necessarily include the additional and distinct power to set the fees for those services. And the doctrine that a general powers provision like section 404(b) may not ordinarily override a specific provision such as section 3622 further undermines appellants' position. *Cf. Maiatico v. United States*, 112 U.S. App. D.C. 295, 301, 302 F.2d 880, 886 (1962).

But most of all, any reasonable examination of the purposes of the Act discloses Congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. The expertise of the Postal Service supposedly is in management, and its authority therefore reasonably extends to basic decisions pertaining to the provision of special, nonpostal and other services. The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates and fees that are fair and equitable, and its authority therefore reasonably extends to all aspects of such decisions, including review of budget estimates, allocation of postal costs, establishment of rates for postage, *and*, it would seem plainly, the setting

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[119] It is generally agreed that the absence of a comma between "special" and "nonpostal" was inadvertent. *ATCMU Opinion*, at 15 n.2.

of fees for those special services which management decides should be provided.

Finally, legislative history clearly belies the contention that Congress intended to continue the prior authority vested in the Postmaster General to establish fees for special services unilaterally. That prior authority was contained in former section 507. But section 507 was specifically repealed and no analogous provision enacted in its place. Moreover, this repeal clearly was not inadvertent since provisions dealing specifically with section 507 authority were included in the postal reform bill which passed the House [120] but were deleted from the bill finally enacted.

In short, a plain reading of the Act, its legislative history, and the purposes implicit in the creation of an independent Postal Rate Commission whose members "shall be chosen on the basis of their professional qualifications," 39 U.S.C. § 3601, all support the district court's conclusion that the Commission's jurisdiction extends to all the fees for special services involved in this case. We therefore affirm the district court order as it pertains to the fees involved in this case.

2. Request for Changes in Postal Rates and Fees. The remaining issue—whether the Postal Service's request for changes in postal rates was valid when submitted on September 18—turns on quite different considerations. On this issue the jurisdiction of the Commission is conceded. The only question is whether the request, as submitted September 18 or as affected by the Board action taken November 7, met all applicable requirements for proper submission. The district court reasoned that under the Act and the Board's own regulations "the

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[120] H.R. 17070, 91st Cong., 2d Sess.; *see also* H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 46 (1970) (section 507 specifically rescinded).

Board must have before it for its consideration at the time it approves the request, the specific rates and fees to be requested." [121] In granting appellee the injunctive relief requested, the court concluded that since the specific rates and fees were not presented to the Board prior to September 18, when the Postal Service submitted the request to the Commission, temporary rates based upon that request could not lawfully be implemented.[122] Appellants' contrary arguments do not convince us that the district court's order must be reversed.

Under the Act only the Board has the authority and the power to make requests for recommended decisions on changes in postal rates and fees, which requests must be based on the determination that such changes would be in the public interest and in accordance with the policies of the Act.[123] At the time in question here the submission of rate requests was governed by certain Operating Procedures adopted by the Board.[124] Subparagraph eight of those Procedures enumerates as one matter specifically "reserved for decision by the Board of Governors":

> Requests to the Postal Rate Commission for recommended decisions on postal rates and mail classification, and action upon such recommended decisions.[125]

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[121] *ATCMU Opinion*, at 7.

[122] *Id.* at 10.

[123] *See* 39 U.S.C. § 202(a), 404(2), 3622(a).

[124] *See* 39 C.F.R. § 211.2 (1975).

[125] Board of Governors of the United States Postal Service, Operating Procedures (December 1971), at 3-4 [hereafter cited as Operating Procedures]. The Act generally permits the Board to delegate the authority vested in it to the Postmaster General, *see* 39 U.S.C. § 402, and the Board has delegated some of its authority, *see* 39 C.F.R. § 3.9 (1975). Subparagraph eight is a specific reservation from that delegation.

Read plainly the meaning of this specifically reserved authority is clear: the Postal Service must obtain the Board's approval of the request it proposes to submit to the Commission. Moreover, absent a clear and authoritative indication to the contrary the reasonable interpretation of this provision is that it is the request itself, not some preliminary study or working paper, that must be submitted for prior Board approval.

Appellants contend, however, that under subparagraph eight the only decision specifically reserved is the threshold determination whether to submit any request at all and that once that decision is made the Service is free to submit a request without first presenting the Board with the specifics of the rate changes it intends to propose or the data in support thereof. An examination of the Operating Procedures as a whole belies appellants' contention.[126]

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[126] We recognize that the Postal Service's interpretation of subparagraph eight is entitled to some deference at least so long as it is reasonable and has been followed with some consistency. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see generally* 1 *K. Davis, Administrative Law Treatise* §§ 5.03-5.06 (1958 ed. and Supp. 1970). As explained at pp. 60-61 below, however, the Postal Service's interpretation, to say the least, places a curious construction on seemingly plain words, is difficult to square with the express purpose of the Procedures, and causes conflict among otherwise harmonious provisions. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *see also* note 113 *supra*. And there is an even more serious problem with a construction of subparagraph eight under which all that need be approved in advance is the general magnitude of proposed increases. Like the post hoc interpretation given by the Board at its November 7 meeting, the Service's interpretation is significantly at variance with the meaning that has attached to the Operating Procedures by virtue of the Board's longstanding and consistent practice of approving the submission of a rate request only after reviewing the specific rates that management intends to propose to the Commission. *See* pp. 62-63 *infra*. In the presence of

A primary purpose behind adoption of the Procedures was to insure that the Board "obtains the data" upon which to base those decisions "of sufficient importance, in the judgment of the Board, to require Board action." [127] Two considerations are persuasive evidence that the threshold determination whether to submit any request at all is not such an "important" decision, whereas approval of management's finalized proposal is. For one, the Act itself devalues that threshold decision by requiring that a request be submitted whenever postal expenses substantially exceed postal income.[128] More than this, the Operating Procedures provide separately that the Board need not initially decide but need only "review, and approve as appropriate," management's determination that there is a "need for rate increases or decreases," a determination which in effect controls the threshold decision whether a request must be submitted.[129] Unless this separate provision is simply redundant—and the Procedures appear too carefully constructed to support that inference—subparagraph eight must reserve for the Board something other than simply that threshold decision. In light of the underlying purpose of the Procedures, *i.e.*, to assure the Board the data necessary for decision, the only reasonable interpretation is the very one that a plain reading suggests: prior to submission the Board must review and approve the request itself, including the specific changes proposed by management and the supporting data.

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such a variance from previously consistent interpretation, and especially where the more recent construction is offered in the midst of litigation over the administrative rules in question, the amount of deference due the agency's interpretation diminishes substantially. *Morton v. Ruiz, supra.*

[127] *See* Operating Procedures, at 2.

[128] *See* 39 U.S.C. §§ 3621-22.

[129] Operating Procedures, at 7.

It is clear, moreover, that under this interpretation the presentation made at the September 4 Board meeting fell substantially short of the requirements of subparagraph eight. Indisputably, at the time of that meeting the process of preparing a rate request "was still incomplete." [130] Indeed, the Board's instructions to management were "that the Postal Service should complete the process of refining its proposed filing with the Rate Commission." [131] And in fact, one day after the Board meeting a Postal Service press release announced that "[t]he exact amounts of the increases to be requested have not been finally determined." [132]

We conclude that on the record properly before us the September 4 presentation failed to comply with the plain requirements of the Operating Procedures.[133]

The action taken by the Board at its November 7 meeting does not affect our conclusion. At that meeting, con-

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[130] And there is no evidence that the Board reconvened to review the completed rate request prior to its submission on September 18.

[131] September 4 Minutes, at 4-5.

[132] United States Postal Service General News Release, September 5, 1975.

[133] The Postal Service argues, however, that despite the clear implications of the minutes of the Board meeting and the press release, the Board did have before it on September 4, in the form of a display chart, the specifics of the very rate request to be submitted to the Commission. That chart, however, is not a part of the public record of the September 4 proceedings before the Board, and appellants did not even offer it into evidence in the district court. Brief for the Appellants, at 8 n.2. It has never been made available to appellees. Brief for Appellee ATCMU, at 32-33. Accordingly, the chart is not properly before us and will not be considered on this appeal, whatever its implication. *See Thomson v. Gaskill*, 315 U.S. 442 (1942); *Drake v. Finance Corp. of Louisiana*, 119 F.2d 588 (5th Cir. 1941).

vened specifically "because litigation involving interpretation of the Operating Procedures had been initiated," the Board did not review any data other than that available September 4. Instead, it discussed whether the September 18 submission was consistent with its interpretation of the Operating Procedures and with the Board's prior practice, and it "unanimously agreed that the presentation, discussion, and Board actions at the September 4 meeting, in regard to the proposed request to the Postal Rate Commission, fully satisfied the requirements of the pertinent provision of the Operating Procedures." [134]

Despite the presumptions generally surrounding administrative action, the deference due an agency's interpretation of its own regulations will depend at least somewhat on the degree to which it is well reasoned and consistent with prior interpretations and action. *E.g.*, *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *see generally*, 1 *K. Davis, Administrative Law Treatise*, §§ 5.03-5.06 (1958 ed and Supp. 1970). Where the words in question, as here, do not require any special competence for their interpretation, a court may well be equally or better qualified to interpret them than is the agency, at least where the agency's interpretation is offered in the wake of litigation which turns on those very regulations.[135] *See Morton v. Ruiz, supra; Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *State of Delaware v. Bender*, 370 F. Supp. 1193, 1204 (D. Del. 1974); *cf. McKart v. United States*, 395 U.S. 185, 197-98 (1969).

The interpretation offered here—that the Board's September 4 approval of the "general magnitude" of the changes to be proposed in management's not then fina-

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[134] November 7 Minutes, at 1-2.

[135] *Compare Fleming v. Van Der Loo*, 82 U.S. App. D.C. 74, 80, 160 F.2d 906, 912 (1947), *with Udall v. Tallman*, 380 U.S. 1, 17 (1965).

lized request fulfilled the Board's obligation under the specific reservation of subparagraph eight—seems hardly reasonable and consistent with a plain reading of the Operating Procedures as discussed earlier. *See D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754, 784-85 (D.D.C. 1970), *reversed on other grounds*, 148 U.S. App. D.C. 207, 459 F.2d 1231 (1972), *cert. denied*, 405 U.S. 1030 (1972). Nor is it consistent with prior practice. To the contrary, minutes of previous Board meetings indicate that both at the time of the first submitted request, which predated adoption of the Operating Procedures, and the second request, which postdated their adoption, the Board reviewed and approved the very request that management proposed to submit to the Commission.[136]

We conclude that the Board's action at the November 7 meeting is not a controlling interpretation of the Operating Procedures and does not require variance from the interpretation discussed above.[137] We hold that the September 4 presentation was inadequate under the

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[136] *See* Minutes of the Meeting of the Board of Governors of the U.S. Postal Service, on January 26, 1971; Minutes of the Meeting of the Board of Governors of the U.S. Postal Service, on September 10, 1973.

[137] The Board attempted to buttress its offered interpretation by including in the minutes statements of "members of the Board who were among the original appointees to the Board" as to what the Board's "intent" was in adopting the Operating Procedures. Such after the fact explanations, however, are entitled to very little weight. A Board, like a legislature, speaks through the final action taken and no member, outside the Board, is empowered to speak with authority for the body. To accord such evidence substantial weight would encourage the transfer of the debate from the boardroom to the court. *See National School of Aeronautics v. United States*, 142 F. Supp. 933, 938 (Court of Claims 1956).

Board's then existing rules and that therefore the September 18 request based upon it was defective.[138]

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[138] It does not avail appellants to argue that the Operating Procedures, as interpreted above, might impose restrictions on the Board's conduct beyond those imposed by the Act. Since the Board promulgated the rules to govern its proceedings and since those proceedings have substantial public impact, the rules, until properly changed, must be scrupulously observed even if more binding than the Act. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Borough of Lansdale v. Federal Power Commission*, 161 U.S. App. D.C. 185, 494 F.2d 1104 (1974); *Pacific Molasses Co. v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966).

Indeed, appellees argue with some persuasiveness that public policy and the Act itself, quite apart from any rules of practice adopted by the Board, mandate the Board's thorough involvement in the process of submitting rate requests and thus by their own force would require reversal of the Board's action in approving management's tentative proposal since that proposal included only the "general magnitude" of increases to be recommended to the Commission. They note that the Governors (who predominate on the Board), unlike the Commission, are "chosen to represent the public interest generally," 39 U.S.C. § 202(a), and that it is far from settled whether the Postal Service must provide a hearing prior to implementation of temporary rates, *see Mail Advertising Corp. of America v. USPS*, 148 U.S. App. D.C. 158, 159, 459 F.2d 1182, 1183 (1972). They conclude from this that the Act therefore requires intimate Board involvement in the request submission process as the only practicable avenue for public input into the important function of setting temporary rates, basing this conclusion on three primary considerations: (1) that it is the Board "which exercises the power of the Postal Service to set temporary rates," *id.*; (2) that it is the request for new permanent rates which in practical and legal effect "sets" temporary rates, *see* 39 U.S.C. § 3641; and (3) that at least under present circumstances "temporary" rates are vitally significant since they have been in effect for a longer period of time than their

Finally, we are unpersuaded that the district court abused its discretion in enjoining implementation of temporary rates until the Postal Service submitted a nondefective request and otherwise met the requirements of 39 U.S.C. § 3641. Contrary to the Postal Service's position, it is not the submission of *any* request but the submission of a *valid* request that activates the provisions of 39 U.S.C. § 3641. Otherwise the carefully constructed limitations of § 39 U.S.C. § 3641(c) could be easily subverted.

Moreover, appellants' second argument—that the district court should have remanded the request and that 39 U.S.C. § 3628 proscribes enjoining temporary rates during such remand—is equally without merit. Remand was not mandated, and even if the court in its discretion had chosen that course, injunction pending resubmission would not have been statutorily foreclosed. Section 3628 applies to judicial review of decisions of the Governors, not to the decision of the Board here challenged. *Mail Advertising Corp. of America v. United States Postal Service*, 148 U.S. App. D.C. 158, 159, 459 Fed 1182, 1183 (1972). Different considerations govern rates sought to

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supposedly "permanent" counterparts. Because the Postal Service's action was in violation of its governing rules of practice, however, we need not reach this issue and therefore express no final determination of it.

Finally, we are unconvinced that the November 7 Board action retroactively validated the otherwise defective September 18 submission. Whether or not an agency has power first to modify its rules to permit ratification of prior action, and then to apply its modified rules to action taken prior to the modification, *see, e.g., United States ex rel. Accardi v. Shaughnessy, supra*, the Board at its November 7 meeting simply did not attempt any such retroactive modification. The Board quite plainly sought instead to portray its regulations as unchanged since their adoption and to characterize the September 4 presentation as in compliance therewith. Our holding rejects that characterization.

be implemented temporarily prior to public hearing than govern the situation for which section 3628 was designed, *i.e.*, implementation of permanent rate changes after full Commission proceedings. The district court's discretion to order injunctive relief is broad. Appellants have shown no clear abuse. We therefore affirm the district court order as it pertains to rates.

B. *The State of Maine Case*

In the final case before us the states, as appellant, contend that the Postal Service's action in implementing the temporary rate increases at issue here, regardless of compliance with procedural requirements, is substantively defective and that the district court erred in denying the requested injunctive relief. Since appellant's arguments parallel those which we already explored thoroughly in NAGCP,[139] we need not examine them here in detail. Briefly, appellant asserts that the Postal Service's request, upon which the temporary rates rest, once again evidences a too restrictive methodology for attribution of costs, thereby threatening illegal cross-subsidization; that the request also demonstrates continued employment of the inverse elasticity rule for allocating unattributed costs, thereby resulting in rates that unduly and unreasonably discriminate against the users of first class mail; and that the Postal Service's progress toward correction of these defects is too slow, if it exists at all. The district court denied appellant's request for injunctive relief, concluding that the rate-making philosophy and methods adopted by the Commission were "simply not invalid as a matter of law" and that in its instant request the Postal Service applied those standards fairly and diligently. We affirm.[140]

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[139] See discussion in Part IIB *supra*.

[140] The fact that the Governors' order of July 7, 1976, terminated the temporary 13 cent rates as of July 18 does not moot this appeal. *See* note 21 *supra*.

At the outset we note that our review is quite narrow. The district court has broad discretion to deny injunctive relief.[141] Unless appellant carries the heavy burden of demonstrating an abuse of discretion, the order must be affirmed. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633-34 (1953).

Appellant correctly asserts that in this most recent request the Postal Service relies on ratemaking principles that differ very little from those which we criticized in *American Publishers* and which we today hold deficient in NAGCP. The instant rate request evidences that attributable costs are still defined as variable costs, and that allocation of unattributed costs is still dependent on demand factors.[142] At the same time, however, there is discernable progress toward improving the data base in an apparent effort to reconcile the Postal Service's concern for accurate measurement of causation with the Act's requirement of extended attribution. For instance, in order to develop data useful in attributing nonvariable costs incurred as a consequence of providing more than one but not all classes or types of service, the Postal

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[141] On December 16, 1975, the district court issued an order denying appellant's motion for a preliminary injunction. In response to appellant's uncontested motion, the court, on December 18, treated the hearing on preliminary injunction as a consolidated hearing on the merits, rendered judgment for appellees, and dismissed appellant's suit.

[142] In the instant rate request the Postal Service proposes to attribute approximately 55.6% and to assign approximately 44.4% of total costs which since the time of docket no. R74-1 have risen an additional $2 billion and now total approximately $14 billion. The district court seems quite correct in observing that "the pace of the Service's advances . . . resemble[s] that of the tortoise." *State of Maine, et al. v. United States Postal Service*, Civil No. 75-1782 (D.D.C., filed December 16, 1975), Opinion, at 19 [hereafter cited as *State of Maine Opinion*].

Service has listed in its present request those fixed costs which benefit a restricted number of classes.[143]

Such programs, however, would not seem to remedy all the defects in the cost variability approach that we have analyzed in NAGCP. Nor does it answer our questions regarding the use of demand factors and, in particular, reliance on the inverse elasticity rule in allocating unattributed costs. But these are issues to be faced squarely only on review of the Governors' order in response to the Commission's recommended decision in docket no. R76-1.

The special but limited role that the Postal Service is expected to play in the development of postal ratemaking methodology properly affects our review of challenges to the substantive merit of submitted rate requests. Unlike in *American Publishers* and the NAGCP cases where we reviewed a ratemaking methodology adopted after full hearings by a Commission which is charged with the duty, and imbued with the expertise, to establish postal ratemaking principles, here we are called upon to examine only the initial step in the process: a request submitted by the Postal Service, as approved by the Board, which understandably is based upon the methodology previously adopted by the Commission.

The Postal Service, after all, does not possess the expertise of the Commission and its request is prepared without the benefit of full hearings. Indeed, it is not required under the Act even to accompany its request with suggestions for the particular rate adjustments it deems suitable.[144] In short, we are wise at this point not to insist that the Postal Service innovate when it prepares a request to submit to the Commission. True,

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[143] *See id.* at 13, 19.

[144] 39 U.S.C. § 3622(a).

the Postal Service is in a "unique position" to formulate a "fundamental approach" to ratemaking,[145] but it is the Commission which, in the end, carries the primary obligation in ratemaking.

We conclude that the district court correctly held that the Postal Service's primary duty is to apply the Commission's ratemaking philosophy and methods fairly and diligently in preparing its rate request.[146] There is ample support in the record for the court's conclusion that the Service did not apply the Commission's principles incorrectly, arbitrarily, with bias, or with inadequate evidentiary support. In sum, we hold that appellant simply has not carried the heavy burden of demonstrating that the district court abused its discretion in refusing to grant appellant the injunctive relief it sought.

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[145] *American Publishers*, 157 U.S. App. D.C. at 408, 485 F.2d at 779.

[146] *State of Maine Opinion*, at 11-12.

MACKINNON, *Circuit Judge*, concurring: In the main I concur in the court's opinion. However, to prevent a possible misreading of the opinion's import with respect to Nos. 75-1856, 75-1857, the National Association of Greeting Card Publishers (NAGCP) case, I add a few words to clarify my views on certain aspects of the court's holding.

The court's analysis of section 3622(b), which "sets forth the cost and noncost considerations that the Commission must take into account in setting rates," [1] could lead to a construction of the Act which to my mind overly emphasizes the cost allocation considerations of subsection (b)(3), so as to leave the remaining seven subsections, the so-called noncost factors, practically devoid of any real meaning or application.

The Per Curiam opinion overemphasizes the extent to which "reasonably assignable" costs, in addition to "attributable" costs, must be allocated in accordance with cost-of-service principles,[2] and further overemphasizes the extent to which the use of cost-of-service principles must be maximized throughout the process of postal rate-setting.[3] As a result it is only the "residuum" of costs which, according to the Per Curiam opinion, may "be used to give effect to the noncost factors expressly set forth in the Act." [4]

My concern is that the opinion not be read as requiring that practically all postal costs be attributed or assigned to some class of mail or type of service on the "direct and indirect" cost-of-service principles contained in subsection (b)(3), with the result that only an in-

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[1] Per Curiam op. at 18.

[2] *Id.* at 31 & n.59.

[3] *Id.* at 34.

[4] *Id.*

significant residuum of costs are assigned in accordance with the seven remaining statutory considerations. In its entirety the controlling section reads as follows:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
>
> (6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
>
> (7) simplicity of structure for the entire schedule and simple, identifiable relationships

> between the rates or fees charged the various classes of mail for postal services; and
>
> (8) such other factors as the Commission deems appropriate.

39 U.S.C. § 3622(b), (84 Stat. 760). A mere reading of this section indicates that Congress intended to vest a substantial discretion in the Commission to recommend rates and fees that are "fair and equitable," that relate to the value of the postal service provided to users, and that consider competition, the effect upon the general public and business interests, the ease of handling certain mailable matter, the simplicity of the entire rate structure and such other factors as the Commission might deem appropriate. But if the Per Curiam opinion regarding section (b)(3) is to be construed as requiring that the attribution and assignment of practically all costs be on a strained cost-of-service basis, these discretionary factors may never have any substantial effect. How could the Commission recommend a rate for a particular class of mail that it found would be "fair and equitable" and would not adversely affect legitimate business interests if practically all the relevant costs were required to be attributed or assigned according to an almost absolute cost-of-service straight jacket? To make the seven discretionary standards meaningful Congress must have intended that there be some substantial volume of costs that are available for assignment.

The proper interpretation of section (b)(3) *in the scheme of the Act and the entire section 3622*, is at the heart of this problem. To repeat, that subsection provides:

> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.

39 U.S.C. § 3622(b)(3). The first admonition of this subsection is that "each class . . . bear the direct and indirect *postal* costs attributable [thereto] . . ." (emphasis added). This deals only with direct and indirect postal costs, and it is my view that the attack the opinion makes on "cost variability" as a method of "identifying [these] attributable costs" for direct and indirect expenditures (Per Curiam op. at 30) overlooks the degree of approval that Congress gave to such method when the House Committee stated in its Report that

> the *attributable* provision establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that *vary* over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved.

H.R. REP. NO. 91-1363, 91st Cong., 2d Sess. 87 (1970) (emphasis added). I would allow the Commission somewhat more leeway in this aspect of their duties to conform to the congressional intent expressed in this quoted portion of the Committee Report.

Next, the Per Curiam opinion states that

> "A plain reading [of section 3622(b)(3)] also clearly suggests that the other costs of the Postal Service that are to be 'reasonably assigned' must also be allocated on *cost-of-service principles.* That is, after the process of extended attribution is complete, a portion of the remaining costs are to be assigned to the various mail classes and postal services to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs."

Per Curiam op. at 31 (emphasis added). While the Per Curiam opinion recognizes that "Congress did not intend that *all* postal costs be either attributable or as-

signed," (Per Curiam op. at 33) a strict application of the principles it announces may reduce the amount of remaining costs subject to "reasonable assignment" to such a minor quantity that the application of the other seven standards will be deprived of any substantial impact.

With this background, the opinion attacks the "Commission's value-of-service approach to assignment of *unattributed* costs [asserting that it] . . . fails to comply with the *plain* requirement of the Act . . . [holding that] it is only residual costs which are subject to discretionary distribution to give effect to noncost factors." (Per Curiam op. at 44-45) (emphasis added).

This contention results from overemphasis on the single word "requirement" and on the forepart of subsection (b)(3), to the exclusion of the remainder of that subsection and of the other seven subsections and does not even correctly interpret subsection (b)(3). The second provision of subsection (b)(3) states

> . . . plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.

This clearly states that a "portion of all other costs of the Postal Service" may be "*reasonably assigned*," and nothing would be more reasonable than that such costs which were not "direct or *indirect* costs" of specific classes or types should be assigned according to the remaining seven subsections. Yet the Per Curiam decision expresses a strong opinion that such costs "*must* be allocated in accordance with cost-of-service principles." (Per Curiam op. at 45; *cf. id.* at 31). This is an impermissible intrusion into the plain language of the statute, and if subsection (b)(3) is given a "*plain* reading," it does not require the emphasis on "cost-of-service principles." The Per Curiam claims this result on the basis of the

legislative history,[5] but such intent, if it exists, is very obscure, and legislative history is not properly reached because the statute plainly states that the postal rates recommendations "shall" also reflect the seven *other* factors enumerated in section 3622. In claiming reliance on legislative history the Per Curiam opinion tries to make too much out of too little. The word "shall" at the forepart of section 3622 is just as mandatory as the word "requirement," in the same section, if not more so, since it applies to the entire section—but the Per Curiam opinion overemphasizes the latter and refuses to recognize the former.

The effect of the Per Curiam construction is to read subsection (b)(3) as though it provided:

> ". . . [T]he Commission shall make a recommended decision . . . in accordance with . . . (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type *on cost-of-service principles.*"

(matter in italics supplied). If Congress had intended a "portion of all other costs of the postal service" to be assigned to particular classes or types on such cost-of-service principles it would have so stated in the Act. It did as much in the forepart of subsection (b)(3) when it provided that "each class . . . or type . . . bear the direct and indirect postal costs attributable [thereto]." And in providing for the attribution of all "*indirect* postal costs" as well as "direct . . . postal costs," Congress pretty well exhausted the postal costs that could properly be assigned on *cost-of-service* principles.

To construe subsection (b)(3), as the Per Curiam would, to overemphasize cost-of-service assignment, would

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[5] Per Curiam op. at 37-39, n.74.

practically require the Commission to lean over backwards in assigning as many other costs as possible on the same basis as the "direct and indirect postal costs." But Congress did not so enact. Instead, Congress provided only that a "portion of *all* other costs of the Postal Service [shall be] *reasonably* assignable to such class or type . . . ." (emphasis added). That is an entirely different standard from one expressing a requirement, or even a preference, that such costs "must" be assigned on a cost-of-service basis. "Reasonable" assignments and "must" assignments are partially self-contradictory. If the costs were substantial that were subject to this alleged cost-of-service basis of assignment, practically no costs whatsoever would be left to be "reasonably assigned" in accordance with the other seven standards in subsection (b), *i.e.*, (1) fairness and equity, (2) the value of the mail service, (3) the effect upon the general public and business users, (4) available alternative service, (5) cost reducing preparation of mail, (6) simplicity of rate structure and (7) other appropriate factors. And, as stated above, unless these seven factors are to be practically meaningless a substantial amount of costs must be available for reasonable assignment pursuant thereto. These seven factors embody major principles that substantially affect the public interest and vital segments of our economy, and they should be fully reflected in the rates.

Accordingly, it is my interpretation of subsection (b) (3) that while some of the other costs may be reasonably assigned on cost-of-service principles, Congress did not intend by the present statute that the amount of costs so assigned would be so large as to prevent the Commission from meaningfully incorporating the remaining standards into the postal rate structure.

In my opinion any interpretation of the Act which overemphasizes the role of the forepart of subsection (b)

(3), so that the other seven factors are in effect read out of existence, must be rejected as inconsistent with this express requirement of the Act that the Commission's recommended rate decision "shall" be in accordance with the policies of the Act and all the policies stated in the ensuing eight subsections of section 3622. The Per Curiam opinion as I read it does not necessitate any such interpretation.[6] Therefore, with the exception of these views I concur in the court's opinion.

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[6] The court properly conceives its scope of review as quite limited and therefore expressly declines to "approv[e] in advance any particular approach" to postal ratemaking. Per Curiam op. at 46. Indeed, it may be that the ALJ erred as much on the side of expansive use, or possibly misuse, of cost-of-service principles as the Commission erred on the side of overly restrictive use. That is, some of the costs "attributed" by the ALJ, as additions to those attributable costs identified by the Commission through the use of a cost variability approach, may not be acceptably assignable even as "best estimates" of the cost consequences of providing a particular class of mail or type of mail service. *See* Per Curiam op. at 39 & n.74. The point is that at this stage we can no more say with confidence, and the opinion expressly does not say, that 70.6% (the ALJ's figure) is acceptable as not too high a level of attribution/assignment than we can say that 52.5% (the Commission's figure) is "simply not enough" attribution. *See* Per Curiam op. at 41, n.81.

see 3779